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CLIENT ACTIVISM IN PROGRESSIVE LAWYERING THEORY

EDUARDO R.C. CAPULONG*

Fostering activism has always been central to progressive lawyering theory. Every approach to the progressive practice of law has contemplated as an essential ingredient some form of client activity—be it collective mobilization, civic participation or simply empowerment. This Article traces the conceptualization of client activism in progressive legal scholarship and argues that its complex and dynamic nature has been undertheorized. Historicizing and disaggregating its various forms, the Article calls for a socially contextualized analysis and differentiation of divergent aims and methods as precursors to defining the lawyer's role in popular activism and fundamental social change.

INTRODUCTION

Fostering activism has always been central to progressive lawyering theory. Without exception, every approach to the progressive practice of law has contemplated some form of client activity or connection with other activism—be it mass movement and mobilization, militant protest, direct action, organization-building, civic participation or simply individual empowerment—as an essential ingredient. For many progressive lawyers, in fact, client activism is the primary object of legal advocacy. It is both means and end, powering efforts at reform and fulfilling the promise of democracy—even revolutionary transformation. For these lawyers, the key question driving legal practice is not what will ensure legal victory, but what will motivate, support and further effective activism. Only organized, politicized mass action from below, these lawyers hold—not law reform—produces fundamental, lasting social change. Indeed, this unique objective distinguishes progressive lawyering from liberal-legalist practice, which focuses intently on legal reform, secured by expert litigators, policy

* Assistant Professor of Law, University of Montana. I owe an enormous debt to many people for reading and commenting on earlier versions of this paper: the 2007 NYU Lawyering Faculty, especially Tigran Eldred and Brent White; and the 2008 Clinical Law Review writers' workshop, especially Ascanio Piomelli, Mary Helen McNeal, Kate Kruse and Steve Berenson. I also thank Diana Yoon, Rina Pal, Derf Johnson and Amanda Hill for their excellent research assistance. Finally, I thank Rebecca Weston, who not only read, commented and provided invaluable insight on this paper, but also sustained me throughout the long process of writing it.

analysts and lobbyists.¹

¹ In this Article, I use the term “liberal-legalist practice” to describe lawyering aimed primarily at legal reform. As Karl Klare describes, liberal-legalism is

the particular historical incarnation of legalism (“the ethical attitude that holds moral conduct to be a matter of rule-following”), which characteristically serves as the institutional and philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general “democratically” promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate on its underlying jurisprudence. With respect to its modern Anglo-American form these include adherence to precedent, separation of the legislative (prospective) and judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ratio decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis (“legal reasoning”). The rise and elaboration of the ideology, practices and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts trained in manipulating “legal reasoning” and the legal process.

Liberal legalist jurisprudence and its institutions are closely related to the classical liberal political tradition, exemplified in the work of Hobbes, Locke and Hume. The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.

Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123, 132 n.28 (1979). See also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996) (confining definition of legal liberalism to court-oriented reform). Thomas Hilbink calls this type of practice “proceduralist” or “elite/vanguard.” Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 *LAW & SOC’L INQUIRY* 657 (2004) [hereinafter Hilbink, *Categories of Cause Lawyering*]; see also Thomas Hilbink, *The Profession, the Grassroots & the Elite* [hereinafter Hilbink, *Profession, Grassroots & Elite*] in *CAUSE LAWYERS & SOCIAL MOVEMENTS* 60-83 (Austin Sarat & Stuart A. Scheingold, eds., 2006) [hereinafter *CAUSE LAWYERING III*].

The prototypical example of this type of practice is that done by the National Association for the Advancement of Colored People Legal Defense and Education Fund or the American Civil Liberties Union, in which lawyers choose cases—and plaintiffs—based on social change strategies they formulate with little or no input from clients and client organizations. For other summaries of liberal-legalist practice, see Sameer M. Ashar, *Law Clinics & Collective Mobilization*, 14 *CLIN. L. REV.* 355, 413, n.224 (2008) (summarizing Ascanio Piomelli’s description of liberalism as marked by “its extreme preference for individual rather than group identity, analysis, and remedies; its aversion to focusing on issues of power, rather than formal rights; its discomfort with radical democracy and its fear of popular passions/excesses; its assumption that the legal system alone is sufficient to make the very small, incremental adjustments necessary to move from status quo to social justice; its presumption of rational expert professionals’ greater ability to diagnose, design, and implement necessary social remedies; and its concomitant skepticism or hostility toward the ability of low-income and working-class people to do the same; its valorization of judicial review and the importance of checking popular opinion and democratic agitation”) (internal citation omitted); Ruth Margaret Buchanan, *Context, Continuity, & Difference in Poverty Law Scholarship*, 48 *U. MIAMI L. REV.* 999, 1020-22 (1994) (describing liberal legalist practice as “incremental and procedural” in nature). It bears noting, however, that even

Yet legion though the literature is that has enshrined this bedrock commitment, progressive lawyers and theorists have paid insufficient attention to the full range of factors that define this unusual professional project. At times, client activism is an unexamined given, warranting no more mention than as a perfunctory, even utilitarian, statement of purpose.² And when progressive scholars, practitioners, activists and other commentators do examine it, they tend to do so within the confines of formalist, apolitical and transhistorical legal and organizing method, imparting important—indeed, for those of us committed to this project, canonical—lessons, but remaining disappointingly impressionistic about their analyses of the attendant, extra-legal forces that shape their mercurial objective.

This should not be surprising. After all, client activism is not formally a province of traditional lawyering theory. Mainstream practice—individualist to begin with—contemplates a passive client reliant upon an attorney who acts, typically alone, on his or her behalf. Indeed, it is only with the “lawyering”³ and “law and organizing”⁴ literature that client activism has cohered as a distinct focus of scholarly inquiry.

But there are other reasons. Although birthed by the social movements of the 1960s and early ‘70s, progressive lawyering *theory*—the broad set of strategies and tactics progressive lawyers and their activist partners have developed to advance their cause⁵—ma-

liberal-legalist practice has roots in and is intertwined with client activism. *See, e.g.*, SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990) (discussing grassroots activism that led to founding of ACLU).

² *See, e.g.*, Ann Fagan Ginger, *The Movement & the Lawyer*, 26 GUILD PRACTITIONER 1, 12 (1967) (acknowledging existence of, but not defining, “movements”); Note, *The New Public Interest Lawyers*, 79 YALE L. J. 1069, 1077, 1081, 1085 (progressive lawyers acknowledging need for, but not defining, “community base,” “political base,” “political power,” or “support of a vocal public”); Santa Barbara Legal Collective, *Is Anybody There? Notes on Collective Practice in WORKPLACE DEMOCRACY & SOCIAL CHANGE* 247, 252 (Frank Lindenfield & Joyce Rothschild-Whitt, eds., 1982) (stating “fundamental” mission of “serving the people,” but seeing “little need to define *the people* with analytical precision”).

³ For an excellent annotated bibliography of scholarship on lawyering theory and practice, *see* J. P. Ogilvy & Karen Czapanaskiy, *Clinical Legal Education: An Annotated Bibliography* (third edition), CLIN. L. REV. (Special Issue) 1 (Fall 2005).

⁴ For summaries of the “law and organizing” literature, *see* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. REV. 443 (2001); Loretta Price & Melinda Davis, *Bibliography: Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2001).

⁵ The terrain of “progressive lawyering,” and therefore “progressive lawyering theory,” is contested ground, with radical and left-liberal variants. Thus, the difference between “liberal-legalist” and “progressive” lawyers does not always cut cleanly—nor should it, as progressives and liberals are, more often than not, allies in the same struggles. As discussed in Section II.B.4, *see infra* notes 215-60 and accompanying text, even lawyers who may be described as “liberal-legalist” consider client activism as a goal, albeit for

tured during a subsequent period of prolonged political conservatism that has been defined largely by the absence of sustained mass movements and the eclipse⁶ of the radical political ideologies and militant organizations that propelled them. For the past three decades, neo-conservative and neoliberal politics have reigned supreme. In this period, two divergent, but equally limited, theoretical currents emerged. On the one hand, under the banner of liberal public interest law, lawyers substituted their own advocacy and leadership (usually through litigation) for grassroots activist efforts. On the other hand, influenced by postmodernist, post-structural and identity-based social theories, many progressive lawyers turned inward, to ideological and parochial concerns, eschewing “meta” theories—the political economy and class analysis in particular—in favor of a narrower preoccupation with the local dimensions of political activism, the lawyer-client relationship and the lawyer’s professional role.⁷

Despite key differences—the most important of which is the explicit centrality of client activism in the latter approach—both theoretical currents share common ground. First, notwithstanding progressive lawyering theorists’ commitment to fundamental social change and social movement-building, proponents of both camps either accept existing institutional arrangements (albeit critically) or are reluctant,

utilitarian purposes, for example, to support ongoing litigation (as opposed to more progressive lawyers who see client activism as an end in itself). See Ruth Buchanan & Louise G. Trubek, *Resistances & Possibilities: A Critical & Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 689 (1992) (“We understand public interest lawyering to include . . . radical lawyering, poverty lawyering, and specialized advocacy for diffuse interests such as consumers and the environment.”) By the same token, the *character* of progressive practice changes as well, depending on the circumstances. Nancy Polikoff captures this dynamic relationship between practice and circumstance in describing the “role confusion” of J. L. Chestnut, a Black lawyer, during and after the civil rights movement in Selma. Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 455-58 (1996). As I argue throughout this Article, “progressive lawyering” is a dynamic term as much as it is a categorical approach and identifying characteristic.

⁶ I thank Ascanio Piomelli for suggesting this word, which, I believe, captures the dynamic between the radical and left-liberal/liberal-legalist variants of progressive lawyering theory.

⁷ Of course, other causes of progressives’ flight from Marxist political economy, class analysis and emphasis on the broad working class as the foremost agent of social change also include the collapse of the Soviet Union (which many equated with socialism), the reemergence of free market capitalism in China and Cuba, and the key role of a stratum of the white working class in the United States in enabling and supporting the Republican neo-conservative agenda. See, e.g., Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 FORD. URB. L.J. 813, 827 (1998) (Soviet collapse marked “the demise of socialism as a plausible way to organize a complex society”). For the argument that the Soviet Union—and by extension China and Cuba—were or are “state capitalist” and not socialist regimes, see TONY CLIFF, *STATE CAPITALISM IN RUSSIA* (1955).

unable or unwilling to articulate alternative normative visions.⁸ Second, while scrutinizing legal practice, progressive theorists, like their liberal-legalist rivals, undertheorize the concomitant historical, social, economic and political forces at work and the state of client activism *writ large*. And third, while committed to grassroots activity, progressive lawyering theorists rely presumptively—and often uncritically—on a similarly narrow band of approaches—“community organizing” and “mobilization,” rather than litigation and policy advocacy—as the primary and, at times, only models for political activism.

In short, progressive legal scholars have paid too much attention to lawyering (by which I mean professional role) and too little attention to carefully scrutinizing client activism—in particular its aims, contexts and methods. The result: mechanical prescriptions that, at best, reinforce formalist (if pluralist) strategy and, at worst, miscalculate the lawyer’s role in promoting client activism and social change.

In this Article, I argue that the aims, contexts and methods of client activism are paramount in progressive lawyering theory, and therefore precede and define the question of how progressives should lawyer. Progressive lawyering scholarship—in the fields of poverty law, clinical practice, critical theory, public interest law, and law and society—is an invaluable resource for activists. Making full use of this literature, I suggest, requires precursory paradigms that: clarify the ultimate political goals to which activism is and should be directed; analyze the social conditions shaping and defining grassroots activity; and, specify and systematize the myriad methods that can and should be used to further these ends. Progressive lawyers engage in these analyses by necessity and know intuitively that there are no mechanical lawyering formulae to building, sustaining and growing client activism. In critiquing prevailing theoretical formulations that relate to these considerations, I argue that progressive lawyers need to go beyond law, lawyering, community organizing, mobilization and social movement-building, and develop a framework for more finely analyzing political aims, contexts and activist methods.

In Part I, I summarize the various, at times conflicting, lawyering approaches to fostering activism. In Part II, I trace the evolution of these approaches since “people’s” and “poverty” lawyers began ad-

⁸ See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 66 (1992) (grand narratives are suspect); Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 302 (1996) (“new generation [should] define an adequate social vision . . . for today’s complicated times”); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project & the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 450 (1995) (social alternative as product of social struggle).

addressing the question in the 1960s.⁹ Situating discussion of lawyering theory in historical context, my aim is to sketch an intellectual history of progressive lawyering and illustrate the decisive role of social, political and economic circumstances on theoretical development and emphases. In Part III, I critique the theoretical limitations I have identified and argue that activists need to clarify their alternative normative visions, carefully analyze the overarching nature of ever-changing social conditions, and broaden, deepen and systematize their understanding of popular activism. Here, I join the efforts of other scholars to situate the development of progressive lawyering theory in historical context¹⁰ and move it in a broader, interdisciplinary direction, including taking such “macro” historical factors into account,¹¹ examining its political foundations¹² and “pass[ing] through the door” of social movement and organizing literature.¹³

I. LAWYER AS ACTIVIST: A BROAD, DEEP CANON

In contrast to liberal-legalist practice, progressive lawyering rests on the sound assumption that no fundamental social change—be it the eradication of racism, poverty, war, sexism, homophobia or other societal ills—can come about solely through legal reform.¹⁴ Only organ-

⁹ Progressive lawyering has been around for as long as the bar has been in existence. See, e.g., RAYMOND CHALLINOR, *A RADICAL LAWYER IN VICTORIAN ENGLAND: W. P. ROBERTS AND THE STRUGGLE FOR WORKERS' RIGHTS* (1990); WILLIAM CHEEK & AIMEE LEE CHEEK, *JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM, 1829-1865* (1989); WENDELL PHILIPPS GARRISON, *WILLIAM LLOYD GARRISON, 1805-1879, THE STORY OF HIS LIFE, TOLD BY HIS CHILDREN (Vol. I)* (1885); ANN FAGAN GINGER, *CAROL WEISS KING: HUMAN RIGHTS LAWYER, 1895-1952* (1993); JOHN MERCER LANGSTON, *FROM THE VIRGINIA PLANTATION TO THE NATIONAL CAPITOL* (1894); JOHN A. SALMOND, *THE CONSCIENCE OF A LAWYER: CLIFFORD J. DURR AND AMERICAN CIVIL LIBERTIES, 1899-1975* (1990); J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* (1993); Water J. Leonard, *The Development of the Black Bar*, 407 ANNALS AM. ACAD. OF POL. & SOC. SCI. 134 (1973). I begin my survey of progressive lawyering theory in the 1960s because it is then that a significant cadre of lawyers began thinking self-consciously about their practice as such. Some scholars date the proliferation of literature extolling such an approach to lawyering to the past two decades. See, e.g., Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLIN. L. REV. 541, 542 (2006) (dating theory and practice of “collaborative lawyering” to mid-1980s).

¹⁰ See Buchanan, *supra* note 1, at 1001 (examining “social, historical, and political conditions during the two periods of scholarly proliferation” on poverty law).

¹¹ See Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERING III, *supra* note 1, at 37-59.

¹² See Piomelli, *supra* note 9.

¹³ See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001); see also Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences From the Streets of Los Angeles*, 35 FORDHAM URB. L. J. 339 (2008); Price & Davis, *supra*, note 4.

¹⁴ See JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 233 (1978) (“[L]aw reform activity by social-reform groups will not result in any great transformation

ized, politicized mass activism from below,¹⁵ aimed at constantly enhancing and enforcing that social change¹⁶ or revolutionizing the entire social and economic order¹⁷ can achieve and maintain such goals.¹⁸

Nevertheless, in contrast to what Steve Bachmann has called the

of American society. Instead, it is, at its most successful level, incremental, gradualist, and moderate. It will not disturb the basic political and economic organization of modern American society"); Ashar, *supra* note 1, at 407, n.209 ("We remain conscious of the need for poor people to create the conditions for their own liberation and skeptical of the checkered history of lawyer-led reform efforts."). Unless otherwise specified, I use the terms "progressive" and "activist" lawyering interchangeably. Hilbink, in his typology, calls them "grassroots." Hilbink, *Categories of Cause Lawyering*, *supra* note 1, at 681-690.

¹⁵ See, e.g., Steve Bachmann, *Lawyers, Law, & Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 21 (1984-85) ("The primary motor of social change is social struggle, not legal struggle. The question thus becomes: to what extent can lawyers and the law have an impact in this 'extra-legal' area? The answer is that lawyers can play meaningful roles in actual social struggles, though their role relates more to the preconditions for social mobilization than to substantive issues. The lawyer's role is more the oiler of the social change machine than its motor; the motor of the machine remains masses of people."); Michael J. Fox, *Some Rules for Community Lawyers*, 14 CLEARINGHOUSE REV. 1, 1 (1980) ("Organized groups of low- and moderate-income people are potentially the most powerful agents for social change in modern America.").

¹⁶ See, e.g., Bachmann, *supra* note 15, at 6 ("social vision" is "participatory democracy"); Piomelli, *supra*, note 9, at 548 ("collaborative lawyering" is "deeply rooted in democratic participation. At its core, collaborative lawyering is an effort to practice, promote, and deepen democracy—more precisely, a participatory democracy in which individuals and communities flourish by unleashing their full energies and potential in joint public action.").

¹⁷ See, e.g., William P. Quigley, *Revolutionary Lawyering: Addressing the Root Cause of Poverty and Wealth*, 20 WASH. U. J.L. & POL'Y 101 (2006). As discussed in Section III.A, *see infra* notes 413-36 and accompanying text, there is an irreconcilable difference between these two approaches: one is reformist and the other is revolutionary. For the classic statement on this difference, see ROSA LUXEMBURG, REFORM OR REVOLUTION (Integer trans., Bookmarks, 1989) (1898).

¹⁸ As discussed in Section III.C, *see infra* notes 451-64 and accompanying text, activism can take on an infinite variety of forms and requires disaggregation and systematization. It includes public protest, mass mobilization and civil disobedience, of course, but it can also include boycotts, teach-ins, alternative radio, street theatre, fasting—and more. For a good discussion of social and political activism, *see* Brian Martin, *Social and Political Activism*, in *ENCYCLOPEDIA OF ACTIVISM & SOCIAL JUSTICE* 19-27 (Gary L. Anderson & Kathryn G. Herr, eds., 2007). In this Article, I use the term to refer the entire range of grassroots activity, including manifestations of *individual* "empowerment." Thus, I borrow and expand upon the definition used by sociologists Sarah A. Soule and Jennifer Earle in describing their data set of protest activity between 1960 and 1986:

First, since we are interested in *collective* action, there must be more than one participant at the event Second, the participants must articulate some *claim*, whether this be a grievance against some target or an expression of support of some target. Finally the event must have happened in the *public sphere* or have been open to the public

Sarah A. Soule & Jennifer Earl, *A Movement Society Evaluated: Collective Protest in the United States, 1960-1986*, 10 MOBILIZATION: AN INT'L JOURNAL 345, 348 (internal citation omitted).

“a-legal” or “crude Marxist” approach,¹⁹ progressive activists recognize that the legal arena remains a forum for social struggle.²⁰ This is so for three reasons: First, activists often do not have a choice but to work within the legal system, as when they are arrested or otherwise prevented from engaging in activism by state authorities. Second, because law is relatively autonomous from economic and political interests,²¹ campaigns for legal reform can win substantial gains and are frequently the only vehicles through which more far-reaching change takes shape; struggles for reform, in other words, beget more radical possibilities and aspirations.²² And third, law is constitutive of the social order. Law—or, more accurately, the concept of it—is not (again as some crude analysts would argue) simply a tool of one ruling class or other, but rather an essential component of a just society.²³

Commentators observe that lawyers who base their practice on these three premises are “hungry for theory,”²⁴ for theory checks the “occupational hazards [of] reformism or cynicism.”²⁵ The theoretical project is thus a dialectic: while law reform alone cannot “disturb the basic political and economic organization of modern American soci-

¹⁹ See Bachmann, *supra* note 15, at 33.

²⁰ See E.P. THOMPSON, WHIGS AND HUNTERS (1975) (law as “arena of struggle”); Cummings & Eagly, *supra* note 4, at 447 (“Unique to the law and organizing paradigm is its insistence that lawyers can advance social justice claims and shift power to low-income constituencies through a particular type of legal advocacy—one that is intimately joined with, and ultimately subordinate to, grassroots organizing campaigns.”); Hilbink, *Categories of Cause Lawyering*, *supra* note 1, at 682 (“Law is but one locale through which society expresses itself. And it presents a place on which battles for social change can be fought.”).

²¹ See Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights From Theory & Practice*, 36 FORDHAM URB. L. J. 604, 606 (2009), citing RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1995, at 1 (1995); see also Klare, *supra* note 1, at 128.

²² See, e.g., LUXEMBURG, *supra* note 17, at 21 (“The daily struggle for reforms . . . offers to the social democracy the only means of engaging in the proletarian class war and working in the direction of the final goal . . . Between social reforms and revolution there exists for the social democracy an indissoluble tie. The struggle for reforms is its means; the social revolution, its aim.”); cf. Bachmann *supra*, note 15, at 33-36 (describing “a-legal” approach eschewing legal activism as misguided and “utopian”).

²³ See, e.g., ALAN HUNT, EXPLORATIONS IN LAW & SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993); EVGENY B. PASHUKANIS, THE GENERAL THEORY OF LAW AND MARXISM (2003); Klare, *supra* note 1.

²⁴ See Robert W. Gordon, *New Developments in Legal Theory*, in POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys, ed., 1982).

²⁵ See Klare, *supra* note 1, at 135; see also Richard Abel, *Lawyers and the Power to Change*, 7 LAW & POL’Y 9, 9-10 (1985) (identifying three characteristics of progressive lawyering: subordinating law to other modes of activism and disciplines; concentrating on state and capital as main sources of injustice; and merging the personal and the political); Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 62, 63 (2007) (discussing practitioners who “strategically deploy[] law in a way that is neither utopian in its hopes for legal reform nor rejectionist in its dismissal of legal avenues of transformation”).

ety,”²⁶ law and lawyering are “a complex, contradictory, and open-textured setting that provides opportunities to challenge the status quo.”²⁷

Activist lawyering has been around for as long as the bar has been existence.²⁸ But it was not until the 1960s that a sizeable cadre of activists began cohering and institutionalizing, in practice and in the academy, a theory of progressive *lawyering*.²⁹ “In the United States,” Richard Abel writes:

. . . it was police action against anti-war protesters that first brought together their defense lawyers and forged the bonds that led to progressive law practices and collectives. Thus, it is collective social, political, and economic activism *outside* the legal system that generates legal activism (first by individuals and then by groups) rather than the reverse . . .³⁰

Thereafter, continues Abel, the

expansion of activist lawyering coincided with the worldwide growth of the welfare state in the 1960s and 1970s, itself a product of the rediscovery of poverty within the postwar economic boom. The proliferation of legal rights and state funding of legal aid both stimulated the growth of new forms of progressive law practice. These practices, in turn, became critical supporters of legal aid, urging more funding, liberalized means tests, extension to new subject matters, and innovative tactics.³¹

²⁶ See HANDLER, *supra* note 14, at 233.

²⁷ See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 8-9 (Austin Sarat & Stuart Scheingold, eds., 1998) [hereinafter CAUSE LAWYERING I].

²⁸ See *supra* note 9.

²⁹ Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Legal Education for this Millenium: The Third Wave*, 7 CLIN. L. REV. 1, 12 et seq. (2000). *But see* McCann & Dudas, *supra* note 11, at 49 (“[c]ause lawyers . . . who dedicate their careers to the pursuit of specific political and/or moral commitments, first emerged in substantial numbers and public identity during the New Deal period”) (internal citations omitted); Cummings & Eagly, *supra* note 4, at 447 (latter day “law and organizing” model “both builds upon and departs from previous discussions of law and social movements by presenting sophisticated theoretical analyses and concrete practical examples of how legal advocacy and community organizing can be integrated as a credible social change strategy”); *see also* William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 553-554 (1980) (“Psychological Vision” of legal practice as one response to politicization of legal doctrine, offering “an approach to legal theory and education which concedes the failure of the doctrinal tradition and yet meets the claims of professional legitimation and professorial consolation”); Thomas Miguel Hilbink, *Constructing Cause Lawyering: Professionalism, Politics, & Social Change in 1960s America* (2006) (unpublished Ph.D. dissertation, NYU) (on file with author) (documenting how cause lawyering became permanent fixture of the legal profession) [hereinafter Hilbink Dissertation].

³⁰ Abel, *supra* note 25, at 7 (emphasis in original).

³¹ *Id.* at 11.

In the academy, the social ferment of that era propelled the development of a progressive critique of law—led by the critical legal studies movement—and progressive critique of legal practice—led by the “second wave” of clinical teachers.³² Together, these scholars and practitioners have produced a progressive lawyering canon of exceptional breadth and depth. In the past four decades, progressives have called for a variety of paradigmatic practices aimed at stimulating client activism—labeling themselves “people’s,”³³ “movement,”³⁴ “poverty,”³⁵ “public interest,”³⁶ “political,”³⁷ “critical,”³⁸ “three-dimensional,”³⁹ “long-haul,”⁴⁰ “community,”⁴¹ “rebellious,”⁴² “facilitative,”⁴³ “collaborative,”⁴⁴ “cause,”⁴⁵ “empowerment,”⁴⁶ “so-

³² See Barry et al., *supra* note 29, at 12 (it was “student demands for relevance” produced by the “zeitgeist of the 60’s” that led to second wave of clinical legal education; “[w]hile clinical teachers were working with law students to use the law as an instrument for social justice and change, proponents of CLS [critical legal studies] were using the classroom to demystify the law and to teach students that political conviction plays an important role in adjudication and that the shape of the law at any time reflects ideology and power as well as what is wrongly called ‘logic.’ However, unlike some CLS adherents whose critique of law and the legal system leads them to skepticism or nihilism, clinical faculty struggled to maximize law’s potential for remedying injustice and inequity.”) (internal citations omitted).

³³ See, e.g., ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER* (1983).

³⁴ See, e.g., Ginger, *supra* note 2.

³⁵ See, e.g., Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L. J.* 1049 (1970).

³⁶ See, e.g., Note, *supra* note 2.

³⁷ See, e.g., Bellow, *supra* note 8; Martha Minow, *Political Lawyering: An Introduction*, 31 *HARV. C.R.-C.L. L. REV.* 287 (1996).

³⁸ See, e.g., Buchanan & Trubek, *supra* note 5; Peter Gabel & Paul Harris, *Building Power & Breaking Images: Critical Legal Theory and the Practice of Law*, 11 *N.Y.U. REV. L. & SOC’L CHANGE* 369 (1982-83); Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 *D.C. L. REV.* 123 (1992); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 *B.U. PUB. INT. L.J.* 49 (1991); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 *HARV. C.R.-C.L. REV.* 415 (1996).

³⁹ See Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 *WISCONSIN L. REV.* 699 (1988) [hereinafter White, *To Learn and Teach*]; Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 *CLIN. L. REV.* 157 (1994) [hereinafter White, *Collaborative Lawyering*].

⁴⁰ See Susan D. Bennett, *On Long-Haul Lawyering*, 25 *FORDHAM URB. L.J.* 771 (1998).

⁴¹ See, e.g., Angelo N. Ancheta, *Community Lawyering*, 81 *CAL. L. REV.* 1363 (1993); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L. Q.* 619 (1992).

⁴² See, e.g., LÓPEZ *supra* note 8.

⁴³ See Richard Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for ‘Facilitative’ Lawyering?*, 1 *CLIN. L. REV.* 639 (1995).

⁴⁴ See, e.g., Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 *CLIN. L. REV.* 427 (2000); White, *Collaborative Lawyering*, *supra* note 39.

⁴⁵ See, e.g., CAUSE LAWYERING I, *supra* note 27; CAUSE LAWYERING III, *supra* note 1; see also THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE & AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold, eds., 2005) [hereinafter CAUSE LAWYERING II].

cial justice,”⁴⁷ “grassroots,”⁴⁸ “democratic”⁴⁹ and “revolutionary”⁵⁰ lawyers, as well as practitioners of “law and organizing”⁵¹ and “mobilization lawyering.”⁵² What makes these approaches or strains within them distinctive is that they do not measure professional success primarily or exclusively in terms of creating favorable law or serving more clients—practices we have come to know as impact litigation/law reform or “access to justice.” Rather, they measure success by how practice raises political consciousness, motivates and strengthens client activity and supports effective grassroots activism generally.

A. ‘The Front is Everywhere’⁵³

In reviewing this literature, two logistical issues bear discussion at the outset: the array of organizational formations with which progressive lawyers undertake this work, and the varying roles they play within them.

I. A Spectrum of Organizational Affiliations

Because nonprofit organizations have become ubiquitous in progressive legal advocacy, it is worth noting that beyond the traditional formations modeled after the American Civil Liberties Union (ACLU) and National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP LDF), and more modern organizations like the Workplace Project⁵⁴ and “Make the Road New York,”⁵⁵ we have today a wide variety of organizations that make primary use of law to cultivate activism. Many progressive lawyers of course work in private firms.⁵⁶ Some devote their practices

⁴⁶ See, e.g., Cole, *supra* note 41; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994).

⁴⁷ See, e.g., Cummings & Eagly, *supra* note 4.

⁴⁸ See, e.g., Hilbink, *Categories of Cause Lawyering*, *supra* note 1.

⁴⁹ See Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009).

⁵⁰ See, e.g., Quigley, *supra* note 17.

⁵¹ See, e.g., Cummings & Eagly, *supra* note 4.

⁵² See Ashar, *supra* note 1.

⁵³ This quotation is taken from WILLIAM R. KINTNER, *THE FRONT IS EVERYWHERE* (1954).

⁵⁴ See Gordon, *supra* note 8.

⁵⁵ See Make the Road New York, Homepage, <http://www.maketheroad.org/> (last visited Sept. 17, 2009).

⁵⁶ See Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293 (1993) (arguing that private public interest law firm structure is “best suited” to litigating civil rights and civil liberties cases); see also Hilbink Dissertation, *supra* note 29, at 97, n.222 (discussing National Lawyers Guild theory of training Southern Black lawyers to become “more competent and more effective personal injury lawyers (because that’s

primarily or exclusively to this effort. For example, Bachmann founded Bachmann and Weltchek to represent the Association of Community Organizations for Reform Now (ACORN).⁵⁷ Others work in law schools. For example, clinics run by Michael Wishnie at Yale, Nancy Morawetz at New York University and Sameer Ashar at the City University of New York represent organized collectives whose primary aim is collective mobilization.⁵⁸ Beyond the nonprofit context reside activist lawyers perched in a variety of organizations.

2. *Varied Professional Roles*

Whatever their organization affiliation, Michael McCann and Helena Silverstein delineate the roles that lawyers play in this endeavor:

staff lawyers . . . work (usually for a mix of salary and case fee) in established organizations such as unions or women's rights groups; *independent cause lawyers* . . . work for fee as special counsel on particular movement cases; and *nonpracticing lawyers* . . . have stepped out of professional roles to contribute in other ways to the cause.⁵⁹

Staff lawyers, continue McCann and Silverstein, may be distinguished further into two ideal types: "technicians" and "activists." As they explain:

The major difference between these two types [is] the degree to which they display [] independent initiative and leadership in pressing their organizations to support movement causes. Staff technicians . . . tend to restrict themselves to executing the more narrowly technical legal aspects (consultation, negotiation, litigation) of campaigns initiated by others. Staff activists, by contrast, distinguish themselves as leaders in formulating group demands, developing group strategies, waging broader political campaigns, and even challenging their own organizations on behalf of constituent interests or principles.⁶⁰

Within this matrix of roles, scholars have debated the question of whether lawyers should *be* organizers in their own right or instead delimit their role to that of lawyer *qua* technician and simply partner

where the money was) [so] they could increase their income through the handling of personal injury litigation and in effect thereby become subsidized to give more time to handling civil rights work for which they were not going to get any compensation.").

⁵⁷ Steve Bachmann, *Bachmann & Weltchek: ACORN Law Practice*, 7 LAW & POL'Y 29 (1985).

⁵⁸ See, e.g., Ashar, *supra* note 1.

⁵⁹ Michael McCann & Helena Silverstein, *Rethinking Law's Allurements: A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING I, *supra* note 27, at 265-66.

⁶⁰ *Id.*; see also Narro, *supra* note 13 (discussing various roles of lawyers in campaigns to organize garment and car wash workers).

with organizers. Proponents of the latter view point to confusion that can arise from playing a dual role,⁶¹ the power imbalance between lawyer and client that can lead to lawyer domination,⁶² and the conservatizing influence law and lawyers can exert on grassroots organizing campaigns.⁶³ Instead of playing the role of organizer, they argue, lawyers instead should proactively seek collaboration with existing organizations⁶⁴ and then abide by certain rules in working with them.⁶⁵ “Know your role within the group and stay within it unless the group gives you clear instructions otherwise,” warns Michael Fox. “Avoid dominance of the group at all costs. Deal with your own different identity for what it is and don’t try too hard to be ‘one of the folks.’”⁶⁶

Adherents of this view urge lawyers to abstain from the political and organizational matters of their clients.⁶⁷ In representing farm workers, for example, California Rural Legal Assistance prohibited its lawyers from joining client organizations, serving as organizational officers or spokespeople, and taking sides in community disputes.⁶⁸ The same perspective informed the work of other civil rights lawyers in the 1960s. “[T]he volunteer civil-rights lawyer is not a leader of the civil-rights movement,” said an instructional memorandum by the Lawyers’ Constitutional Defense Committee (LCDC). “We are there to help the movement with legal counsel and representation, not to tell the movement what it should do.”⁶⁹ The LCDC urged lawyers to refrain from joining picket lines and making policy decisions.⁷⁰ As Stephen Wexler admonished in the context of his work with National Welfare Rights Organization activists:

⁶¹ See, e.g., Polikoff, *supra* note 5.

⁶² See, e.g., Fox, *supra* note 15, at 5 (“through . . . recognition of [lawyers’] education, articulateness and professional mystique, they “may quickly come to dominate” client groups if they interject “too frequently” into nonlegal aspects of group meetings).

⁶³ See Wexler, *supra* note 35, at 1053 (“Poverty will not be stopped by people who are not poor . . . The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves . . .”).

⁶⁴ See Ashar, *supra* note 1 (documenting outreach to immigrant and refugee rights organizations in Baltimore and New York); Fox, *supra* note 15.

⁶⁵ See Fox, *supra* note 15; Quigley, *supra* note 46.

⁶⁶ Fox, *supra* note 15, at 6; see also Quigley, *supra* note 46, at 474, 477 (“Be wary of speaking for the group;” “Never become the leader of the group”).

⁶⁷ See Fox, *supra* note 15, at 5 (lawyer should not intervene too frequently regarding nonlegal matters); Quigley, *supra* note 46, at 474 (lawyer should “never” become group leader); David R. Rice, *The Bus Rider’s Union: The Success of the Law & Organizing Model in the Context of an Environmental Justice Struggle*, 26 ENVIRONS ENV. L. & POL’Y J. 187, 197 (2003) (lawyers should not get involved in organization-building or campaign strategizing); Wexler, *supra* note 35, at 1063 (“lawyer must not lead his clients”); Note, *supra*, note 2, at 1121 (lawyers “should not want to control the Movement”).

⁶⁸ See Note, *supra* note 2, at 1124.

⁶⁹ Hilbink Dissertation, *supra* note 29, at 116.

⁷⁰ See *id.*

No lawyer has a right to deny them . . . victory by structuring the alternatives as they see them or by denying them the chance to choose their own way and use their lawyer to achieve their end. A lawyer must help them do *their* thing, or get out.⁷¹

A contending school of thought sees little problem with lawyers functioning as both technicians and organizers.⁷² In his influential book, for example, Gerald López calls for “rebellious lawyers” to be “co-eminent” practitioners with their clients.⁷³ Instead of a hierarchical attorney-client relationship in which the lawyer always formally represents the client, López envisions a problem-solving, collaborative approach in which the client’s expertise is accorded equal weight.⁷⁴ Michael Diamond sees activist lawyers as

not only interact[ing] with the client on a non-hierarchical basis, but also participat[ing] with the client in the planning and implementation of the strategies that are designed to build power for the client and allow the client to be a repeat player at the political bargaining table. The activist lawyer views the client’s world in broader terms than merely its legal implications. He or she not only considers the political, economic, and social factors of the client’s problem, but assists the client in developing and implementing enduring solutions, legal and non-legal, to these problems and to similar problems that may arise in the future.⁷⁵

Yet a third school of thought sees the role issue more ambiguously. As Diamond and Aaron O’Toole observe, irrespective of lawyers’ acknowledged roles, “[t]he distinction between representing an organization as a lawyer and organizing it as an activist does not cut clearly, whether applied to poverty or corporate law.” They elaborate:

The distinction between lawyering and directing the development of organizations [is] especially artificial when applied to poverty lawyers. Lawyers cannot work for an organization without working through the medium of particular individuals who claim the right to represent the entity. If struggles for internal control are in progress, any advice the lawyer gives will have the strategic character of advice given to a particular faction. If the advice influences the ability

⁷¹ Wexler, *supra* note 35, at 1065; see also Stacy Brustin, *Expanding Our Vision of Legal Services Representation—The Hermanas Unidas Project*, 1 AM. U. J. GENDER & L. 39, 57-58 (1993) (lawyer should rein in desire to lead).

⁷² See JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION 98-99 (1982); Michael Diamond & Aaron O’Toole, *Leaders, Followers, and Free Riders: The Community Lawyer’s Dilemma when Representing Non-Democratic Client Organizations*, 31 FORDHAM URB. L.J. 481, 547 (2004).

⁷³ See LÓPEZ, *supra* note 8.

⁷⁴ See *id.*

⁷⁵ See Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 109-10 (2000); see also Narro, *supra* note 13 (discussing lawyer-led campaign to organize car wash workers in L.A.).

of one side to prevail, the lawyer's representation will literally have an organizing effect.⁷⁶

Thus, a more nuanced examination of lawyers' actual roles yields a theoretical divergence that may be less real than rhetorical. That is, within the matrix of potential professional roles, how lawyers foster activism is a question of the *degree* to which they do so, not *whether* or not they do.

B. *Same Strategies, Different Tactics*

The same can be said for the amalgamation of legal organizing strategies and tactics that have developed over the past four decades. Despite pitched debates—over the use of litigation, for example, or the lawyer's stance vis-à-vis his or her client—practices upon closer examination differ less in kind than in nuance.⁷⁷ In general, progressive lawyers use all available tools at their disposal to nurture activism among their clients and, depending on the situation, prioritize certain methods over others. The tactics may differ depending on circumstance, but the arsenal of strategies remains the same.

1. *'Every tool is a weapon if you hold it right'*⁷⁸

Lucie White has observed that lawyers who engage in this endeavor are “all over the map.”⁷⁹ This always has been so. Long before many progressive lawyers of the 1990s heeded López's “rebellious” call to “refuse to privilege any particular strategy or category of strategies [but] focus on what might work – through assessments that regularly feel *ad hoc*, concrete and provisional,”⁸⁰ Gary Bellow—and many of his contemporaries in the 1960s and 70s—pursued progressive practice characterized not by the legal tactics used, but rather by “a particular, ‘politicized’ orientation to the goals, commitments, and relationships reflected in the [various] strands of a practitioner's ap-

⁷⁶ Diamond & O'Toole, *supra* note 72, at 547.

⁷⁷ Indeed, there is great similarity in earlier and later typologies of activist lawyers. *Cf.* Note, *supra* note 2, at 1072 (public interest lawyers as fitting into three categories: lawyers “aiding the poor; representing political and cultural dissidents and radical movements; [and] furthering substantive but neglected interests common to all classes and races, such as environmental quality and consumer protection”) with Hilbink, *Categories of Cause Lawyers*, *supra*, note 1, at 662-63 (cause lawyers as fitting into three categories: “proceduralist”, “elite/vanguard” and “grassroots”).

⁷⁸ I borrow this term from the singer/songwriter and activist Ani DiFranco's song, “My IQ.” See http://www.righteousbabe.com/ani/puddledive/l_myiq.asp (last visited Sept.17, 2009).

⁷⁹ See Panel III, *Creating Models for Progressive Lawyering in the 21st Century*, 9 J.L. & POL'Y 297, 309 (2001) (comments of Lucie White) [hereinafter White, *Creating Models*]; see also Bachmann, *supra* note 15, at 21-29 (arguing that progressive lawyers should practice First Amendment, corporate, tax, criminal, procedural and ethics law).

⁸⁰ See LÓPEZ, *supra*, note 8, at 69.

proach to legal work.”⁸¹ As Bellow described of his own work:

In some of the efforts, we sought rule changes or injunctive relief against a particular practice on behalf of an identified class. In other situations, we pursued aggregate results by filing large numbers of individual cases. Some strategies were carried out in the courts. At other times we ignored litigation entirely in favor of bureaucratic maneuvering and community and union organizing. Even when pursuing litigation, we often placed far greater emphasis on mobilizing and educating clients, or strengthening the entities and organizations that represented them, than on judicial outcomes. And always, we employed the lawsuit, whether pushed to conclusion or not, as a vehicle for gathering information, positioning adversaries, asserting bargaining leverage, and adding to the continuing process of definition and designation that occurs in any conflict.⁸²

Similarly, three decades before Jennifer Gordon used legal services “as a draw,” law “as a measure of justice,” and law and lawyering “as part of . . . larger organizing campaign[s]” in founding the Workplace Project in Long Island, New York,⁸³ the “people’s” and “poverty” lawyers of the 1960s and ‘70s did much the same.⁸⁴ As long as a politicized orientation exists, progressive lawyers have *always* looked to any and all legal (and non-legal) methods as potential tools—litigating, lobbying, counseling, researching, investigating, educating, organizing, engaging in dialogue and transactional work,⁸⁵ and building leadership⁸⁶—all for the purpose of stimulating and supporting activism. Every tool is and always has been a weapon—so long as it is used to motivate and further effective client activism.

2. *Some Methods Are Better than Others*

Critics of this catholic approach point to the dilution and devolution of the lawyer’s *professional* role in what amounts to a broad injunction to organize. Paul Tremblay, for example, argued that López’s rebellious approach failed to account for the “triage”-like qualities of street-level legal services practice.⁸⁷ Similarly, Ann Southworth argued that the rebellious approach “take[s] the lawyer out of progres-

⁸¹ Bellow, *supra* note 8, at 300. Note, however, that Bellow wrote these observations in a retrospective article published in 1996, four years after López’s book. See also KINOY, *supra* note 33.

⁸² Bellow, *supra* note 8, at 300.

⁸³ See Gordon, *supra* note 8, at 438 et seq.

⁸⁴ See, e.g., KINOY, *supra* note 33.

⁸⁵ See, e.g., White, *Creating Models*, *supra* note 79, at 309.

⁸⁶ See *id.* at 309-10.

⁸⁷ See Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, & Street Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992).

sive lawyering.”⁸⁸ Of course, some methods are better-suited than others in specific situations—but these are tactical contingencies, not dogma.

The touchstone of this more discriminating view usually has been a critique of litigation.⁸⁹ But as with the debate over the lawyer’s role, it bears noting here that the critics of litigation have *never* argued that it not be used, but rather that it not be a default strategy and be used with greater reflection and caution. As Ascanio Piomelli puts it, the skepticism is of “*isolated* litigation conducted as a stand-alone approach to social change, *unconnected to and uninformed by collective public action*.”⁹⁰ That is, even those who advocate prioritizing other, non-litigation, methods recognize that litigation remains an option. Below, I summarize prescriptions from the full range of progressive lawyering theory that, today, constitute the array of strategies and tactics in each dimension in which progressive lawyers operate: litigation, legal services, legislative and administrative “policy” advocacy, and grassroots outreach, education and organizing.

a. Litigation

Affirmative and defensive litigation remain vital to progressive practice. Proponents urge lawyers to use litigation creatively, defensively and counteroffensively.⁹¹ They urge its use to generate public discussion of issues,⁹² influence opinion,⁹³ build coalitions and alliances,⁹⁴ gather information, position adversaries, and assert bargaining leverage.⁹⁵ For example:

An effective political challenge to [an administrative] agency may

⁸⁸ See Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993).

⁸⁹ See Cummings & Eagly, *supra* note 4, at 455 (cataloguing critics’ arguments that litigation “discouraged client initiatives, diverted resources away from more effective strategies, and [left] larger social change undone” and noting that some view litigation as “impediment[] to social change due to . . . [its] potential to ‘co-opt social mobilization.’”) (quoting White).

⁹⁰ See Piomelli, *supra* note 49, at 1385-86.

⁹¹ See KINOY, *supra* note 33.

⁹² See Note, *supra* note 2, at 1087.

⁹³ See *id.*

⁹⁴ See *id.*; see also Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in CAUSE LAWYERING III, *supra* note 1, at 84-100.

⁹⁵ See Bellow, *supra*, note 8, at 300; see also Edgar S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L. J. 1317, 1335-47 (1964) (lawyers can use case and controversy focus to organize people with too little energy to focus on anything more than immediate needs and short-term goals); Narro, *supra*, note 13, at 348-57 (discussing use of litigation in garment worker organizing campaign); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 869-71 (1990) (discussing how *Goldberg v. Kelly* remedy provided welfare activists a “versatile, tactical weapon”).

be impossible without the type of detailed documentation that only systematic discovery techniques can provide. It is on this base that coalitions and publicity can be built, and that groups can be organized to limit previously invisible authority.⁹⁶

Similarly, politically motivated trials can reveal facts and information about the government that otherwise would have been hidden, and, in their repressive and contradictory nature, undermine the legitimacy of—or demystify—the law and courts.⁹⁷

Litigation also can be used to provide a “frame” for lived experiences, as a measure of justice, and to increase client confidence.⁹⁸ Discussing *Goldberg v. Kelly*,⁹⁹ White observed that it:

responded to the needs of [the welfare rights] movement. In addition to securing the tactical resource of a constitutionalized entitlement, the case also provided a rhetorical resource for all subordinated groups. For by enlisting the Constitution’s authority on behalf of poor people seeking to participate in welfare decisions, the case emboldened other groups to voice similar demands. It has given poor people a state-sanctioned basis—a “right”—to seek dignity from the government on a wide scale.

. . .

Legal remedies that are designed by lawyers to impose improved conditions upon the poor aren’t likely to do much to challenge subordination in the long run . . . Yet when legal remedies respond to strategic needs that emerge as poor people mobilize themselves, those remedies can, indeed, make a difference.¹⁰⁰

Litigation has other uses. Advocates have litigated to exit losing organizing campaigns, for example.¹⁰¹ And there are times when litigation, and therefore litigation strategy, are unavoidable. Lawyers are

⁹⁶ Note, *supra* note 2, at 1087.

⁹⁷ See Gabel & Harris, *supra* note 38, at 370, 375 (progressive lawyers should use trials to raise “authentic or unalienated political consciousness” to demystify and delegitimize capitalism); Hilbink Dissertation, *supra* note 29, at 305 (“Demystification involved ‘exploiting the contradictions of the system and heightening them until the courts are forced to vindicate human rights, expose their hackish fascism or be hoisted with their own petard’ . . . [the goal was] to force a confrontation—in the courts or on the streets—whereby the state would demonstrably violate its own laws, its own constitution, showing that injustice occurred in a supposedly just system.”) (internal citations omitted).

⁹⁸ See Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1989); White, *supra* note 95; see also Gordon, *supra* note 8; Note, *supra* note 2, at 1087 (quoting Bellow on uses of litigation to organize).

⁹⁹ 397 U.S. 254 (1970).

¹⁰⁰ White, *supra* note 95, at 871-72; see also Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L.J. 523, 525-26, 541-44 (1994) (environmental justice litigation can build morale, raise profile of community struggle, and educate public and government officials).

¹⁰¹ See, e.g., Bachmann, *supra* note 15; Cole, *supra* note 32.

forced to litigate when their clients are prosecuted for political activity.¹⁰² The political trials of the 1960s and '70s—the Chicago Eight, Oakland Seven and Panther 21 trials, to name a few¹⁰³—are the prototypical examples of the use of litigation—in particular courtroom tactics—to defend and motivate further client activism. Similar to the use of affirmative litigation, lawyers have used political trials “as forums for ‘truth,’ as a means of challenging authority, as a way of educating the public about the defendant’s political stance, and as a way of organizing the movements around a shared experience.”¹⁰⁴ In this context, Peter Gabel and Paul Harris have called on practitioners to use litigation as a way to raise an “authentic or unalienated political consciousness” to demystify and delegitimize capitalism.¹⁰⁵ This is particularly applicable to jury trials. In political trials, the audience for organizing is not merely clients, courtroom attendees and the larger public through the media, but the captive audience of the jury.¹⁰⁶ The New York-based Center for Constitutional Rights, founded by Arthur Kinoy, Bill Kunstler and others, is a prime example of an organization that uses litigation for “movement support.”¹⁰⁷

In sum, as Derrick Bell summarizes, litigation “can and should serve lawyer and client as a community-organizing tool, an educational forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public support.”¹⁰⁸

b. Legal Services

Practitioners also use the provision of legal services to motivate and support client activism. State-funded legal services programs in fact originated with this goal in mind. The precursor to the Legal Services Corporation, the Office of Equal Opportunity, envisioned the participation of clients and client organizations in its operations.¹⁰⁹ Later, as mentioned, proponents would frame this approach as using

¹⁰² See Bachmann, *supra* note 15; Note, *supra* note 2.

¹⁰³ See, e.g., Robert Davis, *The Chicago Seven Trial and the 1969 Democratic National Convention*, CHICAGO TRIBUNE, Sept. 24, 1969, available at <http://www.chicagotribune.com/news/politics/chi-chicagodays-seventrial-story,0,6172471.story>; *Anti-Draft Trial Hearing in SF*, OAKLAND TRIBUNE, Dec. 11, 1968, at 14.

¹⁰⁴ See Hilbink Dissertation, *supra* note 29, at 295.

¹⁰⁵ See Gabel & Harris, *supra* note 38, at 370, 375.

¹⁰⁶ See Hilbink Dissertation, *supra* note 29, at 298 n.795 (discussing juries’ role in effecting participatory democracy, and difference between juries and prosecution and judge).

¹⁰⁷ See Center for Constitutional Rights, Movement Support, <http://ccrjustice.org/movement-support> (last visited Sept. 5, 2009).

¹⁰⁸ Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 513 (1976).

¹⁰⁹ See KATZ, *supra* note 72, at 69.

legal services to draw and then organize clients.¹¹⁰ In founding the Workplace Project, for example, Gordon selectively provided legal services to ensure the continued involvement of key organizers in a community-based immigrants' rights organization.¹¹¹ This is not unlike the NAACP's practice of providing free legal assistance only in cases that are consistent with its campaign to implement *Brown*,¹¹² or the practice of using attorneys as "lures" in organizing anti-war opposition in the military during the Vietnam War.¹¹³

c. *Legislative and Administrative "Policy" Advocacy*

Legislatures are, at least by definition, democratic institutions whose specific function is to invite popular participation. Legislative—or "policy"—advocacy, then, is often used to rally clients. In the administrative arena, the public interest law movement pioneered citizen access to administrative agencies in the 1970s.¹¹⁴ Progressive lawyers have capitalized on these democratic openings to organize client participation.¹¹⁵

In an essay exploring the difference between "rule-shifting" and "culture-shifting," Tom Stoddard argued that because legislatures are majoritarian institutions, legislative advocacy is superior to litigation in the latter regard.

Judicial lawmaking . . . ought not to be abandoned by public interest lawyers Lawsuits are effective at highlighting problems. They may be effective at forcing governments to face up to problems. But they are often ineffective at this long-term resolution of issues with deep cultural roots, for they focus on rules rather than the culture that sustains those rules, and as a result frequently fail to engage or connect with the public.¹¹⁶

Compared to litigation, legislative and administrative advocacy are

¹¹⁰ See, e.g., Gordon, *supra* note 8.

¹¹¹ See *id.*; see also JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANTS RIGHTS* (2005).

¹¹² See Hilbink Dissertation, *supra* note 29, at 39.

¹¹³ See *id.* at 291 (internal citation omitted).

¹¹⁴ See Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory & Practice at the Center for Law & Social Policy*, 59 *GEORGETOWN L.J.* 1095, 1109 (1971) (commitment of public interest lawyers is neither liberal nor conservative, but rather "to the adversary system itself, and specifically, to the principle that everyone affected by corporate and bureaucratic decisions should have a voice in those decisions, even if he cannot obtain conventional legal representation"); see also Section II.B., *infra* at notes 174-272 and accompanying text.

¹¹⁵ See, e.g., Cole, *supra* note 41, at 634-36 (1992) (discussing how "second-wave" environmental activist lawyers helped write most environmental legislation); Narro, *supra* note 13; Rice, *supra* note 67.

¹¹⁶ Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 *N.Y.U. L. REV.* 967, 985 (1997).

more conducive to public participation and, therefore, arguably better vehicles by which to motivate client activism and shift dominant culture.

d. Grassroots Outreach, Education, Mobilization and Organizing

Grassroots outreach, education, mobilization and organizing—which some writers understandably conflate,¹¹⁷ but nonetheless require disaggregation and systematization—are, of course, the most direct methods by which progressive lawyers catalyze client activism. But these methods are outside the monopoly or dominance of lawyers. Only lawyers can litigate and provide legal services. And they can play dominant, specifically defined, roles in legislative and administrative advocacy. Not so for grassroots outreach, education, mobilization and organizing. In McCann's and Silverstein's parlance, here lawyers play the role of both technician and activist; the "independent cause lawyers" and "staff technicians" give way to the "nonpracticing lawyers" and "legal staff activists."¹¹⁸ Because of the myriad ways in which one can organize, there is a breadth of tactics on offer. As Scott Cummings and Ingrid Eagly observe, "[o]rganizing is often used as shorthand for a range of community-based practices, such as organization building, mobilization, education, consciousness raising, and legislative advocacy."¹¹⁹ There is a distinction, as well, between organizing and "popular education." As Cummings and Eagly explain, with popular education, it is the process of arriving at "a more critical understanding of the mechanisms of power and oppression[,] . . . rather than action taken as a result, that constitutes the core of the popular education technique."¹²⁰

II. HISTORICIZING CLIENT ACTIVISM: THEORETICAL EVOLUTION IN CONTEXT

As summarized above, progressive lawyering theory can be read

¹¹⁷ See Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLIN. L. REV. 433 (1998) (discussing community education and community organizing as separate undertakings, but nonetheless conflating them); Bill Ong Hing, *Rebellious Lawyering, Settlement, & Reconciliation: Soko Bukai v. YWCA*, 5 NEV. L. J. 172 (2004) (same); Saru Jayaraman, *Letting the Canary Lead: Power and Participation Among Latina/o Immigrant Workers*, 27 N.Y.U. REV. L. & SOC. CHANGE 103 (2002) (discussing community outreach, education and organizing together); Zenobia Lai, Andrew Leong & Chi Chi Wu, *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 ASIAN PAC. AM. L. J. 1 (2000) (same). *But see* Cummings & Eagly, *supra* note 4, at 481-82 (discussing distinction between popular education and community organizing).

¹¹⁸ See McCann & Silverstein, *supra* note 59.

¹¹⁹ Cummings & Eagly, *supra* note 4, at 481.

¹²⁰ *Id.* at 482.

as a set of, at times, conflicting prescriptions relating to professional affiliation, role and method. My argument is that our shared purpose—popular activism—needs also to be understood from the perspective of (1) clients' ultimate political goals, (2) the larger societal organizing context and (3) the entire panoply of activist methods. In this Part, I place the evolution of progressive lawyering theory in historical context to disaggregate client activism along these three axes. In the most basic sense, the ebbs and flows of theoretical development are not so much the product of one lawyering approach's superiority over another, but rather of necessity and ingenuity—of progressive practice being both a product and agent of historical circumstance. We base our work primarily on the changes we want to see, the circumstances we find ourselves in, and the activism we choose to pursue with clients. This always has been the case. But precisely because theoretical debate largely has been confined to professional affiliation, role and method, progressive lawyering scholarship often has passed over these threshold considerations and launched into examinations of practice without first clarifying what those practices ought to be about.

As described below, the evolution of progressive lawyering theory has gone through five distinct, if overlapping, phases: people's, movement and poverty lawyering in the 1960s and early '70s (collectively, "movement" lawyering); public interest lawyering in the 1970s and beyond; critical lawyering "on the margins" in the 1980s; community or "rebellious" lawyering in the 1990s; and "social justice" lawyering or "law and organizing" in the millenium.

In condensed form, the historical evolution progressed as follows. The movement lawyers rode the crest of militant mass activism and embraced radical objectives. Having won some of those objectives and unable to sustain its momentum in the face of well-funded and organized counterattacks by regrouped adversaries, that activism collapsed and fragmented as the country began to turn rightward politically. In that period, the public interest lawyers (with whom the movement lawyers tangled) became ascendant and paved a reversion to liberal-legalist practice by reconceptualizing clients as an abstract and passive "public," transforming clients into "causes," and raising the banner of "access" to legal institutions (rather than the attainment of their clients' substantive objectives) as their goal. Prototypically, public interest lawyers used litigation as their preeminent tool. (Indeed, the term "public interest law" has become so pervasive that for many law students and lawyers it now encompasses nearly all forms of progressive lawyering.) In the 1980s, as the prospect of sustained activism in the United States dimmed even further, progressive lawyering theory re-

fashioned its role to that of “critic” (of liberal-legalist lawyering) and was pushed, in the words of at least two writers, to “the margins.”¹²¹ In the 1980s, scholars simultaneously turned inward and concentrated on catalyzing activism by refining the lawyer-client relationship, and outward, to struggles outside the United States for inspiration (notably resistance struggles against Apartheid in South Africa and dictatorial, military rule in Central America). Informed by critical legal and lawyering theory, the turn inward sought to end liberal-legalist dominance and its adverse impact on activism but assumed claustrophobic proportions as postmodernism dominated the academy in the 1990s. Not coincidentally, perhaps, the debate over progressive lawyers’ domination of their clients’ political agenda occurred precisely during a more promising political landscape that nonetheless saw little on-the-ground, sustained activism (the Clinton era). Despite eight difficult years of the George W. Bush (Bush II) Administration, the political pendulum may have finally swung back to the left, providing renewed hope for a return to mass activism (as seen in the anti-globalization protests at the turn of the century, post-September 11, 2001 anti-war and pro-immigrant demonstrations, and the groundswell of support for Barack Obama’s presidential campaign). In this current period, it seems that progressive lawyering theory has once again re-oriented outwards.

Let me emphasize a few points before beginning this discussion. First, the historical periods I summarize are contested and overlap, sometimes substantially. I do not profess to render a definitive account of any of them. If anything, my account is revisionist insofar as legal scholarship is concerned. Rather, in taking a historical perspective, I seek only to identify the central dynamic that, I argue, defined progressive lawyering theory in each of these phases. Second, a comprehensive account of popular activism in this long period is also outside the scope of my inquiry. I rely only on selected areas of activism—chief among them, around civil rights, poverty and war—and write an anecdotal rendition of the periods from the perspective of these clients and the lawyers who represented, and continue to represent, them. By placing theoretical development in this perspective, I hope to show that certain lawyering approaches to client activism dominated because of broader social circumstances and not because any given approach is transhistorically relevant or effective.

¹²¹ See Bachmann, *supra* note 15, at 4 (“role that lawyers play in the development and articulation of value and law in society is rather marginal”); White, *Mobilization on the Margins*, *supra* note 98.

A. *'Revolution': The 'New Social Movements' and People's and Poverty Lawyering in the 1960s and '70s*

The radical social movements of the 1960s and early '70s plucked many lawyers from traditional, commercial law practice, and turned them into prolific civil rights, "people's," "poverty" and "movement" lawyers.¹²² In turn, these lawyers emulated their clients politically and culturally, a prototypical relationship that would provide an enduring cast on progressive legal practice.

1. *The New Social Movements*

Raising the banner of radical democracy and revolution, the era's mass movements against racism, war, poverty and sexism—combined with union combativeness toward the end of the period¹²³—not only won sweeping reforms¹²⁴ but, by the late 1960s, shook the very foundations of American capitalism.¹²⁵ The year 1968 best captures the

¹²² Writers have used the term "people's lawyer" in various ways. For example, Diana Klebanow and Franklin Jonas consider Bella A. Lockwood, who practiced in the 19th to early 20th century, as well as Thurgood Marshall and Ruth Bader Ginsburg, as such. DIANA KLEBANOW & FRANKLIN L. JONAS, *PEOPLE'S LAWYERS: CRUSADERS FOR JUSTICE IN AMERICAN HISTORY* (2003). I use the term here to refer to the cohort of lawyers who practiced in the 1960s in the service of the new social movements. See MARLISE JAMES, *THE PEOPLE'S LAWYERS* (1973).

¹²³ As Loren Goldner observed: "From 1966 to 1973, American workers, often led by black workers, became increasingly combative. The strike wave of 1969-70 (the most important since World War II) and the famous wildcats in auto in 1972-73 showed that both 'business unionism' and management were losing control of the working class." See Loren Goldner, *A Critique of Kim Moody's An Injury to All*, <http://home.earthlink.net/~lrgoldner/moodyII.html> (last visited Sept. 12, 2009). The convergence of the new social movements and union militancy saw its high point in the Dodge Revolutionary Union Movement (DRUM), which challenged the Ford Motor Company's treatment of African Americans in its workforce and sought to bring New Left revolutionary politics into the union movement. See DAN GEORGAKAS & MARVIN SURKIN, *DETROIT: I DO MIND DYING: A STUDY IN URBAN REVOLUTION* (1998).

¹²⁴ Among the legal reforms of the era in the legislative arena were: the Civil Rights Act of 1964 and 1968, Pub. L. No. 88-352, 78 Stat. 241 (1964), Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified at 42 U.S.C. § 2000a *et seq.* and 18 U.S.C. § 245 *et seq.* (2000)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (2000)); Fair Housing Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968) (codified at 42 U.S.C. § 3601 *et seq.* (2000)); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 5629 (1963) (codified at U.S.C. § 201 (2000)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651-678 (2000)). Among the reforms in the executive arena: Executive Order No. 11,375, 3 C.F.R. § 684 (1966-70) (requiring federal contractors to establish affirmative action programs for women); Executive Order No. 11246, 3 C.F.R. § 339 (1965) (requiring private contractors receiving federal funds to adopt affirmative action plans, including timetables for giving preferences to women and racial minorities; mandating smaller employers to comply with non-discrimination requirements and imposing more substantive requirements for employers with contracts of more than \$50,000).

¹²⁵ For a summary of the social movements of the 1960s and '70s, see VAN GOSSE, *THE MOVEMENTS OF THE NEW LEFT 1950-75: A BRIEF HISTORY WITH DOCUMENTS* (2004); see

militancy of the 1960s. That “watershed year,” Max Elbaum summarizes, saw the “emergence of a revolutionary-minded layer of activists.”¹²⁶ As he recounts:

Beginning with the explosion of the Vietnamese Tet offensive at the end of January, that year’s extraordinary calendar included Lyndon Johnson’s forced withdrawal from the presidential race in March; the assassination of Martin Luther King in April followed by Black uprisings in more than 100 cities; Robert Kennedy’s assassination in June; and the nomination of Hubert Humphrey as Democratic candidate for president that August while police battered demonstrators in the streets of Chicago.¹²⁷

“[T]he nation,” warned *Newsweek* magazine, is “building toward organized insurrection within the next few years.”¹²⁸ Echoed *Business Week*: “This is a dangerous situation. It threatens the whole economic and social structure of the nation.”¹²⁹ “[E]verything was possible,” wrote Chris Harman.¹³⁰ And in the succeeding few years, these prognoses seemed to bear fruition. Social revolution seemed squarely on the agenda.¹³¹

The frequency of protest activity and the size, militancy and influence of leading organizations are, by now, legend. Closely examining such activity as reported in the *New York Times* between 1960 and 1986, sociologists Sarah Soule and Jennifer Earle report a peak of 1,052 protest events in 1965—nearly three daily.¹³² Protesters engaged in “outsider tactics,” such as “rallies, demonstrations, marches, vigils, pickets, civil disobedience, physical or verbal attacks, riots, melees, or boycotts.”¹³³ Their numbers were massive. At its height, the civil rights movement commanded the following of hundreds of

also TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1988); JAMES MILLER, *DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO* (1987); HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* (2003). Mass left-wing militancy was not confined to the United States. Nineteen sixty-eight was also the year of the French May general strike, “Prague Spring,” Italian “Hot Autumn” and Portuguese revolution. See MAX ELBAUM, *REVOLUTION IN THE AIR: SIXTIES RADICALS TURN TO LENIN, MAO AND CHE* (2002); CHRIS HARMAN, *THE FIRE LAST TIME: 1968 AND AFTER* (1988).

¹²⁶ See ELBAUM, *supra* note 125, at 16.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1.

¹²⁹ *Id.*

¹³⁰ HARMAN, *supra* note 125, at viii.

¹³¹ See White, *supra* note 95, at 873 (Justice Brennan wrote *Goldberg v. Kelly* opinion in context of “widespread frustration . . . real fears, among the nation’s elites, of full-scale social revolution”); see, generally, FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 181-359 (1979); ZINN, *supra* note 125, at 435-528.

¹³² See Soule & Earle, *supra* note 18, at 350. Protest activity declined thereafter. *Id.*

¹³³ See *id.* at 352.

thousands—if not millions—of Americans. The landmark March on Washington on August 28, 1963, for example, (in which Dr. Martin Luther King, Jr., gave his famous “I Have A Dream” speech) broke records by drawing more than 250,000 to the Lincoln Memorial.¹³⁴

A slew of stalwart organizations provided the backbone for these historic mobilizations. At its height, Dr. King’s Southern Christian Leadership Conference (SCLC), an umbrella organization of civil rights organizations, had 247 organizational members and worked in 16 Southern and border states.¹³⁵ Other organizations, including the Student Non-Violent Coordinating Committee (SNCC), which also led civil rights organizing in the South; the Students for a Democratic Society (SDS), which led the anti-war movement nationally; the Black Panther Party, which spearheaded the Black Power movement; and the National Welfare Rights Organization (NWRO), which led the welfare rights movement, were also sizeable and influential.¹³⁶ In an interview with CNN in August, 1996, Black Panther co-founder Bobby Seale recalled that after Dr. King’s assassination in 1968,

my party was jumping by leaps and bounds. In a matter of six months, we swelled; in 1968, from 400 members to 5,000 members and 45 chapters and branches . . . Our newspaper swell[ed] to over 100,000 circulation. By mid-1969, we had 250,000 circulation . . . We got 5,000 full-time working members in the Black Panther Party, mostly college students . . .¹³⁷

Martha Davis estimates that at one point, the membership of the NWRO “stabilized at about 20,000.”¹³⁸

Among these activists were approximately three million who considered themselves “revolutionary,”¹³⁹ many of them organized cadre of leading radical organizations. The largest and most dominant of

¹³⁴ See, e.g., BRANCH, *supra* note 125, at 132.

¹³⁵ ENCYCLOPEDIA OF ASSOCIATIONS 762 (Margaret Fisk ed., 6th ed., 1970). The 1980 edition of the Encyclopedia reports that the SCLC had 80 chapters and 12 staff members. ENCYCLOPEDIA OF ASSOCIATIONS 904 (Denise S. Akey ed., 15th ed., 1980). See also Adam Fairclough, *The Preachers and the People: The Origins and Early Years of the Southern Christian Leadership Conference, 1955-59*, 52 J. OF SOUTHERN HISTORY 403, 404 (1986).

¹³⁶ See, e.g., EMILY STOPER, *THE STUDENT NONVIOLENT COORDINATING COMMITTEE: THE GROWTH OF RADICALISM IN A CIVIL RIGHTS ORGANIZATION* 71, 79 (1989) (discussing SNCC’s growth to nearly 200 paid staff members in 1964 and “large number of local volunteers, some of them full time”); see also HOWARD ZINN, *SNCC: THE NEW ABOLITIONISTS* (1965).

¹³⁷ See Spartacus Educational, <http://www.spartacus.schoolnet.co.uk/USAseale.htm> (last visited Sept. 16, 2009).

¹³⁸ See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS & THE WELFARE RIGHTS MOVEMENT, 1960-1973*, at 55 (1993).

¹³⁹ See ELBAUM, *supra* note 125, at 18; see also Geoff Bailey, *SDS and the Struggles of the 1960s*, SOCIALIST WORKER, Apr. 28, 2006, at 10, available at http://socialistworker.org/2006-1/586/586_10_SDS.shtml.

these were the “New Left” activists, avowed “Marxist-Leninists” who looked to the revolutions in China, Cuba and Vietnam, among other militant struggles, for inspiration.¹⁴⁰ In contrast to classical Marxism, which looked to the “working class,” these aspiring revolutionaries—prefiguring a key element in progressive lawyering theory—looked primarily to the “oppressed”—people of color, the poor, women, gays and lesbians—as the primary agents of social change.¹⁴¹ The New Left theorists of the period dismissed the predominantly white working class in the United States—which they equated with the “middle class”—as “bought off” by their affluence and “white privilege.”¹⁴² Working class whites, they argued, were too economically comfortable and benefited too much from racism, imperialism, sexism and homophobia to be allies in struggle.¹⁴³ Progressives therefore sought to organize autonomously among African-Americans and other people of color, poor people, women and other oppressed groups, which, in the 1960s, were the motors for social struggle. By then, the radicalism of the organized, predominantly white, working class, which led the anti-poverty and union struggles of the 1930s and ‘40s, indeed had waned—in turn the result of McCarthyism, Stalinism and middle-class affluence. To the disappointment of classical Marxists and other radicals, for example, many unions at the time supported the Vietnam War.¹⁴⁴

2. *People’s and Poverty Lawyering*

Activated by these movements, the progressive lawyers of the 1960s and ‘70s adopted like perspectives and tactics—even lifestyles. They took mass activism and civil disobedience as givens, questioned the legitimacy of “the Establishment” and sought to forge co-equal partnerships with their clients in their pursuit of radical social change.¹⁴⁵

Ann Fagan Ginger’s view was shared by many: “What is the movement? I won’t attempt a definition, but certainly there is a peace

¹⁴⁰ See ELBAUM, *supra* note 125, at 110.

¹⁴¹ See *id.* at 129-44.

¹⁴² See Bailey, *supra* note 139.

¹⁴³ See *id.*

¹⁴⁴ See STEVE BABSON, *THE UNFINISHED STRUGGLE: TURNING POINTS IN AMERICAN LABOR, 1877-PRESENT* 160-61 (1999); WALTER GALENSON, *THE AMERICAN LABOR MOVEMENT, 1955-1995*, 123-25 (1996); PHILLIP S. FONER, *U.S. LABOR & VIETNAM WAR* (1998); FRAN KOSCIELSKI, *DIVIDED LOYALTIES: AMERICAN UNIONS & THE VIETNAM WAR* (1999); RONALD RADOSH, *AMERICAN LABOR & UNITED STATES FOREIGN POLICY* 443-444 (1967); *Labor Endorses Vietnam Policy*, N.Y. TIMES, Oct. 29, 1965, at 88; David R. Jones, *Labor Vows ‘Unstinting Support’ of Vietnam Policy*, N.Y. TIMES, Dec. 16, 1965, at 2.

¹⁴⁵ See Anthony P. Sager, *Radical Law: Three Collectives in Cambridge*, in *CO-OPS, COMMUNES & COLLECTIVES* 136, 138 (John Case & Rosemary C.R. Taylor, eds., 1979)

movement, a student movement, a movement of the poor for welfare rights and tenants' rights, and movements of the Negro people, the Spanish-American people, and the immigrants."¹⁴⁶ Clients—or “the people” (as movement lawyers sought to demystify the lawyer-client relationship and saw themselves as co-equal activists)—were in motion: organizing, challenging, radicalizing.

The focal point of that activism was “the System.” Hence, although the various movements sought reform—civil rights, an end to the war in Vietnam, free speech, gay and lesbian rights, immigrant rights—taught by their own experiences and New Left ideology, they also simultaneously questioned the ability of the legal system (and capitalism, in general) to meaningfully effectuate their demands. The New Left activists saw their goal as replacing the current system with something different, which some articulated as a “radical democratic vision”¹⁴⁷ or socialism.¹⁴⁸ The “System” and “Establishment”—capitalism and the state—were the problem and enemy, to be confronted or avoided as circumstances warrant, or to be manipulated when possible or necessary. While progressive lawyers at the time did not have a common political ideology (indeed, they disagreed on any number of political issues¹⁴⁹), they all pursued progressive lawyering as an explicitly politicized endeavor. This, of course, was the era of the Gulf of Tonkin, Richard Nixon, and the Chicago Democratic National Convention. People saw government duplicity and complicity firsthand. “What characterize[d] this period in legal relationships as contrasted with earlier periods,” observed Robert Lefcourt, at the time a member of a legal commune in New York,

[was] precisely an ‘erosion of the concept of legality.’ The erosion [was] characterized by (1) a belief that the law and legal institutions are not only unresponsive but illegitimate; (2) a condemnation of the bureaucratic delays, judicial indifference, and overt racism of most courts; (3) a rejection, and in many instances a contempt for Establishment officials—police, judges and lawyers; and (4) an affir-

¹⁴⁶ Ginger, *supra* note 2, at 12.

¹⁴⁷ See ZINN, *supra* note 136 (discussing SNCC's and Ella Baker's vision of radical democracy). For a good discussion of SNCC's and Ella Baker's radical democratic vision, see Piomelli, *supra* note 9, at 587-95.

¹⁴⁸ See JAMES, *supra* note 122; LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER & THE COURTS (Robert Lefcourt, ed., 1971).

¹⁴⁹ For example, while Bill Kunstler, Michael Tigar and Stephen Wexler expressed trepidation about engaging their clients' politics, Robert Lefcourt argued that the relationship between lawyer and client was one “in which political convictions and the exposition of a political program and beliefs are not outside the lawyer's province and not reserved for comment by the client alone.” LAW AGAINST THE PEOPLE, *supra* note 148, at 4. Ralph Nader also argued against the influence of Marxism, which the New Leftists espoused: “Who needs Marxist-Leninist rhetoric when you can get them on good old Christian ethics?” Note, *supra* note 2, at 1105.

mation of individual rights and an identification with group, class, racial and sexual liberation.¹⁵⁰

“In the past,” echoed Bill Kunstler, “lawyers, myself included, viewed the law as sacred and inviolate. But movement law considered the legal system as something to be used or changed, in order to gain the political objectives of the clients in a particular case.”¹⁵¹ Progressive lawyers would enforce or create laws that suited their agenda, violate and challenge those that did not, and change “the System” to benefit their clients’ interests.

In the era of civil disobedience and radical ideals, “[t]he task of the litigator . . . is a combination of offense and defense to protect the Movement against attack and to use the rules of the courtroom game to keep its leaders out of jail and to prevail in particular confrontations which circumstances dictate must take place in the courtroom.”¹⁵² In this period, progressive lawyers unanimously believed that social movements—not the law or lawyers—were the agents of social change. “The thing I understood after six months there [Washington, D.C.],” said Marian Wright Edelman, who was working with the Jackson, Mississippi, office of the NAACP LDF at the time, “was that you could file all the suits you wanted to, but unless you had a community base you weren’t going to get anywhere.”¹⁵³ Test case litigation by itself, echoed Bellow, was “a dead end . . . ‘rule’ change, without a political base to support it, just doesn’t produce any substantial result because rules are not self-executing: they require an enforcement mechanism.”¹⁵⁴ Bellow, who represented the Black Panther Party and United Farm Workers, used a series of class action suits to “encourage[] clients to give mutual aid to others in similar situations, to join or create organizations that permitted them to act collectively in pressing their grievances, and to educate themselves about the systemic nature of many of the problems they encountered.”¹⁵⁵

The lawyer’s role was “serv[ing] the movement”¹⁵⁶—i.e., supporting activism. Presaging arguments made by Anthony Alfieri, López

¹⁵⁰ LAW AGAINST THE PEOPLE, *supra* note 148, at 11.

¹⁵¹ WILLIAM M. KUNSTLER, MY LIFE AS A RADICAL LAWYER 103 (1994).

¹⁵² Michael E. Tigar, *Lawyer’s Role in Resistance*, in LAW AGAINST THE PEOPLE, *supra* note 148, at 12.

¹⁵³ Note, *supra* note 2, at 1081.

¹⁵⁴ *Id.* at 1077. Many attorneys at the time echoed this sentiment. Jim Lorenz of California Rural Legal Assistance talked about the need for a strong client base and “political power.” *See id.* at 1085. Ralph Nader talked about the need for the support of a vocal public. *Id.* at 1099.

¹⁵⁵ Bellow, *supra* note 8, at 298.

¹⁵⁶ JONATHAN BLACK, RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 302 (1971) (quoting Kunstler).

and Gordon decades later, Wexler, then a NWRO attorney, argued that traditional legal practice was “either not relevant to poor people or harmful to them.”¹⁵⁷ To strengthen client organization, argued Wexler, a lawyer should “refuse to handle matters for individuals not in the organization.”¹⁵⁸ Lawyers should train clients to do legal work, he argued, and must not lead them.¹⁵⁹

Movement lawyers also used the courtroom as a forum for political education and advocacy. In criminal trials, for example, they used the proceedings to raise larger political issues instead of presenting traditional legal claims. They attempted to discuss discriminatory hiring policies, the civil rights movement, the legality of the Vietnam War, post-colonial practices, free speech, police brutality, and other issues.¹⁶⁰ As commentators have noted, Kunstler made a staple of

attacking the presiding judge with gusto, identifying with the radical ideology of the defendants, using the trial to make political statements of his own, engaging in theatrics to attract attention, departing from the accepted standards of courtroom behavior, seeking publicity to give a positive spin on his clients, turning tables on the prosecution by putting the legal system on trial, and employing humor as a tactic of the defense.¹⁶¹

In criminal trials, Kunstler—like other movement lawyers—aimed to collaborate with clients in courtroom tactics. As contrasted with traditional practice, in which lawyers spoke for their clients, Kunstler and others sometimes used the tactic of “self-defense,” in which clients spoke to the court and, more importantly, the jury, directly. This tactic aimed to demystify the law.¹⁶²

Through the use of the full range of legal tools, the lawyer’s goal was the self-organization of, and partnership with clients to sustain, a social movement capable of radically transforming society. “[T]he test of success for a people’s lawyer,” argued Arthur Kinoy was

not always the technical winning or losing of the formal proceeding. Again and again, the real test was the impact of the legal activities on the morale and understanding of the people involved in the struggle. To the degree that legal work helped to develop a sense of strength, an ability to fight back, it was successful. This could even

¹⁵⁷ See Wexler, *supra* note 35, at 1054. By traditional legal practice, Wexler meant the formal, often paternalistic representation of the client by his lawyer. *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ See Hilbink Dissertation, *supra* note 29, at 303-04.

¹⁶¹ KLEBANOW & JONAS, *supra* note 122, at 308; *see also* Hilbink Dissertation, *supra* note 29, at 131 (citing example of attorney telling state judge to “drop dead” while using civil rights removal statute).

¹⁶² See Hilbink Dissertation, *supra* note 29, at 113-14 (quoting and summarizing Father Robert Drinan, former Dean of Boston College Law School).

be achieved without reaching the objective of formal victory.¹⁶³

As he continued: “If it helped the fight, then it was done, even if the chances of immediate legal success were virtually nonexistent.”¹⁶⁴

Indeed, the Office of Economic Opportunity (OEO), the predecessor to the Legal Services Corporation, which attracted thousands of law graduates into “poverty” lawyering, attempted to institutionalize client activism by requiring the poor’s “maximum feasible participation” in the war on poverty.¹⁶⁵ The OEO sought to develop “indigenous leaders” among the poor.¹⁶⁶ Here, too, poverty lawyers, like their counterparts in the other movements, were closely allied with the welfare rights movement. The landmark case *Goldberg v. Kelly*, White later observed, “was part of a grassroots movement for the poor. Its remedy expanded the movement’s tactical options and gave legal expression to its normative vision[.]”¹⁶⁷

Again, presaging later formulations, movement lawyers considered themselves co-equal activists with their clients.¹⁶⁸ “The role of the radical lawyer,” said Kinoy, “*was the same as the role of the radical in any arena of life.*”¹⁶⁹ In trying to forge these co-equal relationships, however, they were also mindful of dominating the movements, organizations and clients they represented. These lawyers worried that they would unnecessarily conservatize activism or co-opt it into legal channels.¹⁷⁰ Some believed that because lawyers were not typically of

¹⁶³ KINOY, *supra* note 33, at 57-58.

¹⁶⁴ *Id.* at 71.

¹⁶⁵ See Economic Opportunity Act of 1964, H.R. 11377, Section 202(a)(3), 88th Cong., 2d Sess., 1964. See generally Daniel S. Shah, *Lawyering for Empowerment: Community Development & Social Change*, 6 CLIN. L. REV. 217 (1999). As Jack Katz explained in the context of poverty law: “‘Community’ legal counsel, ‘neighborhood’ offices, representation of poor clients on the board, and ‘community education’ all resonated with themes that ran through national social welfare policy in the 1960s: ‘outreach,’ ‘maximum feasible participation,’ ‘community control.’” KATZ, *supra* note 72, at 69. For a history of civil legal services in the United States, see ALAN HOUSEMAN & LINDA PERLE, *SECURING LEGAL JUSTICE FOR ALL: A BRIEF LEGAL HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* (2003); DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* 89 et seq. (1969).

¹⁶⁶ See Hilbink Dissertation, *supra* note 29, at 177-78.

¹⁶⁷ White, *supra* note 95, at 872-73.

¹⁶⁸ See BLACK, *supra* note 156, at 302-03; Ginger, *supra* note 2. As John Flym put it, I live with the people I represent. I represent very few people who are not friends, to a greater or lesser degree. I participate in their activities. My life style is different because I don’t think of myself as a lawyer at all. I am a human being. I have a skill, and I spend my time doing things among people that I like.

Note, *supra* note 2, at 1144; see also Muhammad I. Kenyatta, *Community Organizing, Client Involvement, and Poverty Law*, 35 MONTHLY REVIEW 5, 23 (1983) (“genuine sense of identification with the poor”).

¹⁶⁹ LAW AGAINST THE PEOPLE, *supra* note 148, at 277-78 (emphasis added).

¹⁷⁰ See Wexler, *supra* note 35, at 1065 (“No lawyer has a right to deny them [] victory by structuring the alternatives as he sees them or by denying [clients] the chance to choose

the oppressed, they had no business leading them politically. To guard against this, the people's and poverty lawyers sought to demystify their professional status by training their clients to be paralegals and to advocate for themselves.¹⁷¹ Lawyers formed politicized legal collectives that strived for equal office relationships.¹⁷² They opened offices close to where their clients lived and worked rather than staying in downtown locales. Many flocked to the South to assist the civil rights movement.¹⁷³

B. 'Access': America's 'Right Turn' and the Ascendance of Public Interest Lawyering in the 1970s and Beyond

The political "right turn" that U.S. society underwent in the ensuing years¹⁷⁴ fundamentally altered this orientation. As the new social movements collapsed, movement lawyering collapsed with them—in reality, if not in rhetoric. For long after these movements' twilight, progressive lawyers continued to speak of them as if they still existed or their revival were still a realistic possibility under the changed, inhospitable circumstances. In the reactionary period that began in the mid-1970s, the truth was that the movements could not respond adequately to the twin strategy against their political militancy—state repression and its diversion into respectable institutional channels. Consequently, the radicalism of the movement lawyers was eclipsed by the liberalism of the "new public interest lawyers."¹⁷⁵ With the ascendancy of public interest lawyering came a shift in focus away from movement lawyers' open challenge to law and legal institutions toward instead seeking "access"¹⁷⁶ to those institutions—from radical

their own way and use their lawyer to achieve their end. A lawyer must help them do *their* thing, or get out.")

¹⁷¹ See Kenyatta, *supra* note 168, at 18 (describing efforts of NWRO).

¹⁷² See KUNSTLER, *supra* note 151; Paul Harris, *The San Francisco Community Law Collective*, 7 *LAW & POL'Y* 19 (1985); Sager, *supra* note 145; Santa Barbara Legal Collective, *Is Anybody There? Notes on Collective Practice*, in *WORKPLACE DEMOCRACY & SOCIAL CHANGE* 247-256 (Frank Lindenfield & Joyce Rothschild-Whitt, eds., 1982); Hilbink Dissertation, *supra* note 29, at 308-20 (discussing formation and problems of law communes).

¹⁷³ See Cahn & Cahn, *supra* note 95, at 1334.

¹⁷⁴ This phenomenon has been widely discussed. See, e.g., MIKE DAVIS, *PRISONERS OF THE AMERICAN DREAM* (1986); THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* 78-113 (1987); ZINN, *supra* note 125, at 573-82.

¹⁷⁵ See Note, *supra* note 2.

¹⁷⁶ RALPH NADER & MARK GREEN, *VERDICTS ON LAWYERS* vii (1976); see also Halpern & Cunningham, *supra* note 114; Benjamin W. Heineman, *In Pursuit of the Public Interest*, 84 *YALE L. J.* 182, 184 (1974) ("advancement of the public interest does not necessarily depend upon substantive victories of the unrepresented but instead [upon] participation"); cf. David Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 *DUKE L.J.* 327 (1996) (criticizing liberal notion of access as cause for crisis in public interest law).

movementism to “professionalized reform.”¹⁷⁷ The substantial litigation victories that continued even after the collapse of mass activism only reinforced this reorientation. To many, those victories demonstrated that legal institutions could be receptive to (self-preserving) social change. This receptivity ushered the use of litigation (and legal advocacy in general) to catalyze mass activism—a profound reversal of roles. No longer were living, breathing mass movements using lawyers to strengthen their politics and organization. Instead, beginning in the mid-1970s, lawyers began to rely on legal advocacy to salvage and revive the waning political movements. Rhetorically, client activism remained an essential component of public interest lawyering.¹⁷⁸ But it became secondary to legal reform, and its goal was now simply institutional *participation*, not belligerence and radical change.

Four factors defined the ascendance of public interest lawyering in this new era. First was the return of economic crisis to the U.S. (and world) economy, which provided the ruling class the imperative to regroup and reunite behind an economic and political counteroffensive against the radicalism of the New Left. Second was the New Left’s inability to defeat this counteroffensive. In the face of a reconsolidating political and economic elite, the New Left was hampered by its political and organizational orientation, and immaturity; once mighty, it fragmented, dissipated and atomized. Third, the social movements became victims of their own successes. The litigation brought by movement and poverty lawyers flourished under a more receptive state apparatus: public interest lawyers obtained institutional acceptance and ideological and financial support from state agencies, foundations and the bar. Poverty lawyers achieved their greatest successes, for example, *after* the welfare rights movement collapsed. Public interest law was born in this double-edged period of receptivity and support. Finally, in the academy, the two progressive legal disciplines, which arose out of the social ferment of the previous era—critical legal studies (CLS) and the second wave of clinical legal education—bifurcated, obscuring the dialectic between law reform and fundamental social change. Without challenging the foundations of capitalism, the “constitutive theory of law,” a cornerstone of radical legal theory and practice, became the intellectual basis for a new reformist lawyering project. As a consequence, progressive lawyering increasingly emphasized professional competence over political substance, a pro-

¹⁷⁷ See KATZ, *supra* note 62, at 172-178.

¹⁷⁸ For example, leading public interest law advocate Ralph Nader insisted on the role of “citizen action.” See ROBERT F. BUCKHORN, *NADER: THE PEOPLE’S LAWYER* 37 (1972); RALPH NADER, *THE RALPH NADER READER* 344 (2000); see also Note, *supra* note 2, at 1077, 1081, 1085, 1099 (various public interest lawyers discussing need for activism).

cess-oriented liberalism over a substantive radical agenda.

1. *The 'Employers' Offensive'*¹⁷⁹: *America's Right Turn*

The “system,” writes the historian Howard Zinn, underwent a “complex process of consolidation” in the 1970s.¹⁸⁰ It was a process whose goal was not only the arrest and reversal of the gains of the new social movements, but also the dismantling of the New Deal. And it had far-reaching economic, political and social dimensions. There had been powerful opposition to the new social movements all along, of course. But the economic crisis of the mid-1970s compelled the U.S. ruling class, which, until then, had been divided on its response to left-wing militancy, to reconsolidate and mount a united counteroffensive.

a. *Return of Economic Crisis*

The post-war prosperity that doubled real incomes and dramatically expanded and reshaped the American middle class came to a halt in 1973. The recession that began in November that year and lasted until March of 1975, was “by far the longest and deepest economic downturn in the United States . . . since the Great Depression;” it was the time in which “the great developments that eventually drove American politics to the right became dramatically evident.”¹⁸¹ Coupled with stiffer economic competition from Japan and Germany,¹⁸² the recession formed the basis for a new employer consensus

¹⁷⁹ Various authors have used this term to describe measures corporations undertook to restore profitability in the mid-1970s. See, e.g., ROBERT BRENNER, *THE ECONOMICS OF GLOBAL TURBULENCE* 146 (2006).

¹⁸⁰ See ZINN, *supra* note 125, at 554.

¹⁸¹ See FERGUSON & ROGERS, *supra* note 174, at 78. The economic deterioration was evident as far back as 1965, when the profits of U.S. firms began to decline, and, in the ensuing 15 years, would fail to regain their 1960s levels:

Annual net investment in plant and equipment followed suit, falling from an average 4 percent of GNP during 1966-70 to 3.1 over 1971-75 and 2.9 percent over 1976-80. As the baby-boom generation moved into the job market into the 1970s, the average annual growth rate of net fixed investment per worker dropped even more sharply, falling from 3.9 percent during 1966-70 to a bare 0.4 percent over 1976-80. Productivity suffered in turn, as the annual growth of output per worker employed in nonresidential business fell from 2.45 percent over 1948-73 to 0.08 percent over 1973-79. Not surprisingly, overall growth rates tumbled. Average annual growth in real GNP also tumbled, from 4.1 percent over 1960-73 to 2.3 percent over 1973-80.

Id. See also WILLIAM C. BERMAN, *AMERICA'S RIGHT TURN: FROM NIXON TO CLINTON* (2d ed. 1998); THOMAS BYRNE EDSALL, *THE NEW POLITICS OF INEQUALITY* (1984).

¹⁸² The United States emerged from World War II the dominant world economic power. But because of the succeeding arms race with the former Soviet Union—developing what commentators have called the “permanent arms economy”—it declined in relation to other countries that pursued no such policy. By the early 1970s, Germany and Japan had caught up economically with the U.S., in particular in the auto and electronics industries. See Michael Kidron, *A Permanent Arms Economy*, 28 *INT'L SOCIALISM* 8 (1967), available at <http://www.marxists.org/archive/kidron/works/1967/xx/permarms.htm>; see also DAVIS,

to bust unions, lay off workers, and cut wages and benefits. It was the dawn of American de-industrialization, a competitive retooling that sought to recapture U.S. world economic dominance at the expense of workers and the poor.

Thus began the (to-date largely unabated) economic and social decline of the progressive lawyer's clientele. Poverty lawyers bore witness to their clients' worsening living conditions. Whereas poverty rates declined continuously from 1959 to 1974, rate increases were evident by 1978. Between 1978 and 1980, the percentage of people in poverty rose from 11.4 to 13. Between 1980 and 1983, it rose further to 15.2.¹⁸³ Then, again, between 1990 and 1993, the poverty rate rose from 13.5% to 15.1%.¹⁸⁴

The recession laid the basis for what then Secretary of the Treasury John Conolly called a "new level of partnership" between big business and government.¹⁸⁵ As a *Business Week* editorial put it:

Some people will have to do with less—cities and states, the home mortgage market, small businesses and the consumer will all get less than they want. It will be a hard pill for many Americans to swal-

supra note 174, at 181 ("military Keynesianism has strained the financial system to the point of crisis and contributed to the virtual destruction of the competitive position of American manufactures").

¹⁸³ These are official rates, widely acknowledged to be a poor measure of real poverty. See, e.g., William Julius Wilson & Robert Aponte, *Urban Poverty*, 11 ANN. REV. SOCIOL. 231 (1985); Carolyn J. Hill & Robert T. Michael, *Measuring Poverty in the NLSY97*, JCPR WORKING PAPERS 210 (Northwestern U./U. Chicago Joint Center for Poverty Research, 2000).

¹⁸⁴ See FERGUSON & ROGERS, *supra* note 174, at 80. As John Calmore has noted: From 1970 to 1990, the number of neighborhoods with at least forty percent poor people more than doubled and the total number of persons residing in such neighborhoods grew from 4.1 million to eight million people. The number of African Americans in such neighborhoods increased from 2.4 million to 4.2 million, with most of them living in highly segregated, ghetto neighborhoods. Latinos living in barrios, or high-poverty areas, rose from 729,000 to two million.

John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, & Poverty*, 67 FORDHAM L. REV. 1927, 1930 (1999) (internal footnotes omitted). See also DAVIS, *supra* note 174, at 178 ("protracted stagflation produced chasms of inequality between working-class strata. In the 1970s, for instance, the wage differential (not including supplementals) between steelworkers and apparel workers virtually doubled; or in absolute terms, where the difference between their wages in 1970 was \$83, in 1980 it was \$277!") (citation omitted); Wilson & Aponte, *supra* note 183, at 235 ("For workers, the picture became particularly gloomy. After averaging 3.8 percent over 1965-69, unemployment rose 5.4 percent over 1970-74 and 7 percent over 1975-79. Average real gross weekly earnings for private nonagricultural workers moved erratically in the late 1960s and early 1970s, rising 3 percent between 1965 and 1969, then dropping in 1970 below their 1968 level, then rising again to a postwar peak in 1972. After that they trended sharply downward, and by 1980 reached their lowest level since 1962. Real median family income also stagnated: after doubling between 1947 and 1973, it dropped 6 percent over 1973-80.").

¹⁸⁵ See ROBERT FISHER, LET THE PEOPLE DECIDE: NEIGHBORHOOD ORGANIZING IN AMERICA 122 et seq. (1994).

low—the idea of doing with less so that big business can have more. Nothing that this nation or any other nation has done in modern history compares in difficulty with the selling job that must be done to make people accept the new reality.¹⁸⁶

b. Political Dimensions of the ‘Employers’ Offensive’

The Right had a blueprint for that “selling job” as early as 1971. That year, upon the request of the National Chamber of Commerce, American Bar Association president (and later Supreme Court Justice) Lewis F. Powell, Jr. sounded the alarm and penned a memorandum laying out a strategy. “[B]usiness and the enterprise system are in deep trouble,” he wrote, “and the hour is late.”¹⁸⁷ He declared: “We are not dealing with sporadic or isolated attacks from a relatively few extremists or even from the minority socialist cadre. Rather, the assault on the enterprise system is broadly based and consistently pursued. It is gaining momentum and converts.”¹⁸⁸ Arguing that the “survival” of capitalism was at stake, Powell observed that “[t]he most disquieting voices joining the chorus of criticism come from perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians.”¹⁸⁹ Lamenting big business’ response—“appeasement, ineptitude and ignoring the problem”¹⁹⁰—Powell argued that “the time has come – indeed, it is long overdue – for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.”¹⁹¹

The plan was for a systematic counteroffensive. Powell called for the appointment of executive vice-presidents to implement his strategy.¹⁹² Among other initiatives, he called for “staffs of eminent scholars, writers and speakers, who will do the thinking, the analysis, the writing and the speaking” for big business; the evaluation of textbooks for political “balance”; equal time for pro-capitalist activists in campus activities; and graduate courses extolling the virtues of capitalism and

¹⁸⁶ *Id.*

¹⁸⁷ Confidential Memorandum, “Attack on American Free Enterprise System,” from Lewis F. Powell to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce, dated Aug. 23, 1971, at 1, http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html [hereinafter Powell Memorandum]. As an attorney, Powell was known as someone who had advised all southern governors to ignore the decision in *Brown v. Board of Education*. See Arthur Kinoy, *The Role of the People’s Lawyer in the 1990s*, 2 TEMP. POL. & CIV. RTS. L. REV. 209, 218 (1993).

¹⁸⁸ Powell Memorandum, *supra* note 187, at 1.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 2.

¹⁹¹ *Id.* at 3.

¹⁹² *Id.*

“action programs” for secondary schools.¹⁹³ These initiatives would lead to the establishment of right-wing public interest law organizations, such as the Heritage Foundation, Pacific Legal Foundation, and others.¹⁹⁴

Big business heeded Powell’s advice. Partly in response to Nader’s success in holding them accountable, corporations intensified their lobbying. In 1970, for example, there were only 71 full-time corporate lobbyists in Washington; by 1978, there were, 4,000.¹⁹⁵ Businesses also set up hundreds of political action committees.¹⁹⁶

Similar efforts were underway in government, the courts and the mainstream bar. The urban riots that roiled many cities in the late ‘60s provided the Right with the opportunity to argue for “law and order.”¹⁹⁷ Richard Nixon campaigned and won on that platform. “Nobody is above the rule of law and nobody is below the rule of law,” he declared in a familiar stump speech.¹⁹⁸ Later, the political shift would result in the absorption of civil rights activists into the Democratic Party and all levels of government, particularly in the Carter Administration.¹⁹⁹

The Supreme Court, too, began shifting to the right. In the 1970s, the Burger Court checked the liberal “judicial activism” that characterized the previous Warren era as mainstream lawyers decried the tactics of the new social movements and their lawyers. Worried about how the latter’s courtroom tactics undermined “public confidence in

¹⁹³ See *id.* at 4-6.

¹⁹⁴ See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT* (2008); William H. Mellor III & Clint Bolick, *The Quest for Justice: Natural Rights and the Future of Public Interest Law* (Heritage Found. Lectures No. 342, 1991).

¹⁹⁵ See KLEBANOW & JONAS, *supra* note 122, at 439.

¹⁹⁶ See, e.g., *THE POLITICS OF INTEREST GROUPS TRANSFORMED* 175 (Mark P. Pattaka, ed., 1992).

¹⁹⁷ There were riots in Watts in 1965, Cleveland in 1966, and Newark and Detroit in 1967. See Hilbink Dissertation, *supra* note 29, at 221.

¹⁹⁸ See *id.*

¹⁹⁹ See DAVIS, *supra* note 174, at 256-60; see also Karen O’Connor & Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J. L. & PUB. POL’Y 483, 492-93 (1984) (discussing access of public interest law firms to Carter Administration and Carter’s recruitment of “large numbers of public interest advocates,” including former NAACP LDF attorney Drew Days III as Assistant Attorney General and Chief of the Civil Rights Division within the Department of Justice; former Nader associate Joan Claybrook as head of National Highway Traffic Safety Administration; and former Center for Law and Social Policy director Joseph Onek as White House Domestic Policy staff from 1977-1979). Carter also appointed “numerous movement attorneys to the federal bench,” including Ruth Bader Ginsburg, who was former head of the Women’s Rights Project of the ACLU, and Patricia Wald, formerly associated with the Mental Health Law Project. *Id.* Among the other ways in which progressive lawyering flourished were the recognition of the special role of group representation of minority interests, see *NAACP v. Button*, 371 U.S. 415 (1963) and *In re Primus*, 436 U.S. 412 (1978), and the inclusion of attorneys’ fees award provision in several civil rights statutes. *Id.*

the entire system,” Chief Justice Warren Burger endorsed “ABA recommendations that placed stricter limits on attorney behavior in the courtroom.”²⁰⁰

2. *Ideological Disorientation and Organizational Collapse of the New Left*

The New Left found itself ill-equipped to respond. In the span of just a few years, activists saw movements surge, then retreat. This dynamic—which exhausted many—sowed confusion. Without a unifying political and organizational footing, such as an experienced, rooted, mass political party might have provided, separatism and fragmentation took hold.²⁰¹ By the turn of the decade, for example, the Students for a Democratic Society (SDS) had become bitterly factionalized.²⁰² Similar developments were taking place in the women’s movement. In the civil rights movement, the split between those who sought participation in the electoral arena and those who sought revolution deepened. Sharon Smith explains how separatism and “consciousness-raising” (which were based on the theory of patriarchy) doomed the women’s movement:

As the radical feminist movement disintegrated over the years, the assumption behind separatism took hold: that only those who suffer a certain type of oppression can fight it. The concept of a unified revolutionary movement was thus replaced by one in which each oppressed group would form its own ‘autonomous’ movement. This conception, ‘movementism’, was the precursor to identity politics.²⁰³

²⁰⁰ See Hilbink Dissertation, *supra* note 29, at 302 (citing Fred Graham, *Burger Finds Courts Imperiled by Breaches of Civility at Trials*, N.Y. TIMES, Aug. 8, 1970). Chief Justice Burger reportedly “lambasted ‘young people who go into the law primarily on the theory that they can change the world by litigating in the courts.’” *Id.* at 419 (internal citation omitted).

²⁰¹ See Sharon Smith, *Mistaken Identity – or Can Identity Politics Liberate the Oppressed*, 62 INT’L SOCIALISM 3 et seq. (1994).

²⁰² See, e.g., *BERKELEY IN THE SIXTIES* (Kitchell Films, 1992).

²⁰³ Smith, *supra* note 201, at 11. Consciousness-raising tended to lead women away from activity, argues Smith. *Id.* at 10. As an end in itself, it focused on personalism rather than on movement building: “changing one’s lifestyle was what mattered, not changing the world.” *Id.* Patriarchy, on the other hand, she argues

targeted men – and men’s need to dominate women – as the root of the problem. This left the problem of women’s oppression as one to be fought out at the level of individual relationships. And it excluded men, whatever their social class, from playing a role in fighting for women’s liberation. Moreover, since separatism explains the division between men and women as biologically rooted, this means that the rupture must be permanent. However radical the concept of patriarchy may have sounded in theory, in practice it was a recipe for passivity and divisiveness. Particularly when combined with the high degree of personalism which existed, the logic of separatism promoted fragmentation rather than unity on the basis of oppression.

Leading activists, many of whom looked to Maoism as a guide, also found themselves in crisis as China's revolutionary excesses came to the fore and its leaders increasingly betrayed its "communist" orientation by accommodating Washington.²⁰⁴ Protest activity consequently waned. Compared to the 1960s, when thousands of protest events were recorded, 1974 saw less than half that number.²⁰⁵

3. *Litigation Successes of People's and Poverty Lawyers*

The movements, too, became victims of their own successes. Even as fragmentation and atomization beset them, movement attorneys were scoring landmark successes in court. In the area of poverty law, for example, Jack Katz observes that "[a]s welfare litigators won what organizers saw as 'stunning victories,' welfare organizations lost members in droves."²⁰⁶ Indeed, Katz reports that reform litigation by Legal Services Corporation ("LSC") lawyers actually achieved its greatest success *after* the dissolution of welfare recipients' organizations.²⁰⁷ Hence: "the impetus for reform, although symbolically muted, became independent of a supporting social-movement context . . . after the Legal Aid tradition had been broken by the dynamics of the sixties, *politically neutral standards of professional quality became autonomous sources for an impetus toward reform*["]."²⁰⁸

Radical movementism was supplanted by "professionalized reform."²⁰⁹ Like the Legal Aid Society before it, the LSC "not only banished the earlier spirit of indignation over social-class injustice; they managed to eradicate the memory of a more aggressive advocacy and to socialize a staff that would regard its primarily passive representative role as fulfilling the profession's highest aspirations to equal justice."²¹⁰ As Katz noted:

Ever since its creation in 1974, the LSC has steered clear of indignant commentary on the social reality of poverty in the United States. The research projects funded by the corporation have emphasized standard professional and administrative concerns such as how to keep the federal courts open to Legal Services litigation and how to reduce staff turnover, *not the development of a guiding philosophy on the relation of law to social-class justice for the poor*. One of the consequences of the professional narrowing of reform con-

Id. at 10-11.

²⁰⁴ See ELBAUM, *supra* note 125, at 207-226.

²⁰⁵ See Soule & Earle, *supra* note 18, at 350-51.

²⁰⁶ KATZ, *supra* note 72, at 102.

²⁰⁷ See *id.* at 179 (internal citation omitted).

²⁰⁸ *Id.* at 89 (emphasis added); see also Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 4 (1977).

²⁰⁹ See KATZ, *supra* note 72, at 69-70.

²¹⁰ *Id.* at 10.

cerns is that there has been little written commentary on the socio-political implications of the process.²¹¹

Legal Services lawyers sought to channel inner-city dissent and anger to the “orderly processes of law.”²¹² The outright restriction of Legal Services attorneys from participating in organizing efforts only exacerbated this trend.²¹³ The next-generation of public interest lawyers crystallized this remarkable transformation of progressive legal practice from a political to a professional orientation.²¹⁴

4. *Ascendance of Liberal Public Interest Law*

Three features distinguished public interest lawyering from its movement-lawyering antecedent: a fealty to the legal system and “Establishment,” the representation of “causes” rather than organized clients, and the primacy of lawyers. Its rise would have—and continues to have—wide-ranging and contradictory consequences for progressive law practice. On the one hand, the public interest law movement channeled and moderated the militancy of movement lawyering within the confines of the very system that movement lawyers had challenged. On the other hand, it also produced a new generation of committed practitioners and, in the process, heralded the development and maturation of progressive lawyering theory as such.

a. *Fealty to the Legal System*

Unlike movement lawyering, the goal of public interest lawyering was not to radically reform or overthrow the state, but rather to defend and perfect it through the creation of what Nader, one of its key leaders, called the “public citizen.”²¹⁵ For public interest lawyers, “the system itself wasn’t the problem. The problem lay in the imbalance” of representation within its institutions.²¹⁶ To correct this imbalance, public interest lawyers sought access to²¹⁷ and representation of the

²¹¹ *Id.* at 179-80.

²¹² See Hilbink Dissertation, *supra* note 29, at 222-23 (“At least in the face it showed to the public and the political world, Legal Services was serving the cause of social stability and social control.”).

²¹³ *Id.* at 238-41.

²¹⁴ See NADER & GREEN, *supra* note 176, at 162 (discussing how victories “came relatively easily in the early years” because “[g]overnment agencies and the industries they regulated, unaccustomed to having their actions challenged, had grown careless about the ways they did business.”).

²¹⁵ See BUCKHORN, *supra* note 178; KLEBANOW & JONAS, *supra* note 122; NADER, *supra* note 178, at 336-53.

²¹⁶ See Hilbink Dissertation, *supra* note 29, at 388-89.

²¹⁷ See Buchanan, *supra* note 1, at 1016 (“Expanding access to legal services for the disadvantaged was a much less controversial goal than broad-scale political and social transformation.”); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 226-7 (1976) (public interest lawyers as “by-product of

marginalized and underrepresented in legal and political processes.²¹⁸ In a word, they sought pluralism²¹⁹—goals wholly in line with voices seeking to divert New Left radicalism into institutional channels. Hilbink contextualized its development this way:

Amidst the growing anti-war street protests against the nation's involvement in Southeast Asia, amidst increasingly louder calls for revolution by some and repression by others, amidst a civil rights movement that was increasingly dominated (at least in the white American mind) by nationalist calls for racial separation and violent confrontation, there emerged a group of lawyers still willing to engage with and use the system to achieve their goals. They sought reform, but sought it within the bounds of legality.²²⁰

Nader and others recognized the need for client self-activity.²²¹ But whereas the movement lawyers of the previous era envisioned it for radical, even belligerent, purposes, public interest lawyers sought merely a “perpetuation of that *external* presence”²²² that could exert delimited pressure for legal reform, while still *respecting* institutional processes. At the height of the new social movements, the militant tactic of civil disobedience and direct action openly challenged state authority; the new formulation tamped down that militant tendency. No longer was it potentially part of the agenda to take over the state apparatus or to challenge it through parallel institutions. Rather, popular activism devolved into outside pressure on legal institutions whose legitimacy was again re-recognized—indeed whose re-legitimation was part of the agenda. Hence, while the public interest law movement sprang from the new social movements,²²³ it became, in essence, their exact opposite. As Thomas Hilbink put it, public interest lawyers “*were* the establishment.”²²⁴

Nader himself distinguished process from outcome. “Having access,” he maintained, “does not ensure a fair outcome.”²²⁵ Robert Rabin observed this transformation from substantive to procedural justice:

the ‘access explosion’”).

²¹⁸ See Note, *supra* note 2, at 1078, n.16.

²¹⁹ See *id.* at 1070, n.3; Rabin, *supra* note 217, at 224-25 (“the fashioning of governmental policy out of demands of competing interest groups”).

²²⁰ Hilbink Dissertation, *supra* note 29, at 325.

²²¹ See *supra* note 178 and accompanying text.

²²² NADER & GREEN, *supra* note 176, at xvi (emphasis added).

²²³ See MICHAEL MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 20-30 (1986).

²²⁴ Hilbink Dissertation, *supra* note 29, at 342.

²²⁵ NADER & GREEN, *supra* note 176, at xvii; see also Rabin, *supra* note 217, at 207, 224, n.53, 230, n.73 (“it is critical to keep separate the questions of formal access (standing) and effective access . . . [c]ompelling officials to hear unfamiliar arguments is not necessarily tantamount to insuring that those officials will *listen* to the arguments”).

[T]he underlying commitment of the new practice is not to specific social platforms, whether liberal or conservative; *it is, rather, to the adversary system itself*, and specifically, to the principle that everyone affected by corporate and bureaucratic decisions should have a voice in those decisions, even if he cannot obtain conventional legal representation.²²⁶

It was a “deeply conservative enterprise,” admitted another public interest pioneer, Charles Halpern.²²⁷ Movement lawyers attempted to show clients how the system did *not* work and therefore needed radical transformation through direct action and self-help. Limiting their goal to representing the un- and under-represented, on the other hand, public interest lawyers aimed to make sure that the system *did* work—with themselves as self-appointed leaders and crusaders. And in what movement lawyers would have considered heresy, corporations, Halpern argued, “cannot be condemned for having as their major concerns production, profit and the maintenance of power” for “the social benefits achieved by corporations seeking these goals are obvious and impressive.”²²⁸ To movement lawyers, of course, the corporate-government partnership was *the* enemy.

b. Representation of ‘Causes’

“Cause” lawyering, or what Hillbink calls its “proceduralist”/“elite/vanguard” variant,²²⁹ emerged out of this fealty to the legal system and capitalism. The exit of mass social movements from the political stage dovetailed perfectly with the public interest lawyers’ professed commitment to abstract social *causes*. Indeed, to the extent it undermined these belligerent goals, public interest law hastened these movements’ decline. Unlike a people’s lawyer, said Nader, a public interest lawyer is “*a lawyer without clients*, whose goal would be . . . advancing the public good.”²³⁰ In the aftermath of the decline of the new social movements, this shift became a convenient reorientation.

Public interest law funders, such as the LSC and the Ford Foundation, also ensured that the new generation of poverty and public interest lawyers excluded client involvement and organization from their motivational calculus. The LSC sabotaged its own efforts to insti-

²²⁶ Rabin, *supra* note 217, at 1109.

²²⁷ See Halpern & Cunningham, *supra* note 114, at 1116.

²²⁸ *Id.* at 1096. Indeed, Kinoy objected to being called a “public interest lawyer.” Kinoy, *supra* note 187, at 209-210.

²²⁹ Hilbink, *Categories of Cause Lawyering*, *supra* note 1.

²³⁰ See KLEBANOW & JONAS, *supra* note 122, at 418 (emphasis added). Nader’s public interest firms concentrated their work on consumer and environmental issues.

tutionalize client involvement.²³¹ At the Ford Foundation, an officer noted that public interest law was a “significantly and perhaps extraordinarily powerful . . . means of enhancing the effectiveness of government.”²³² Alice O’Connor summarized the agenda of public interest law’s benefactors when she observed that Ford’s “philanthropic activism functioned on [the] assumption that ‘a smooth-running foundation-government partnership would—or should—displace political struggle, ideological conflict, and grass roots organizing as a means of influencing social policy”²³³

Increasingly detached from a grassroots advocacy, the new public interest lawyers autonomously defined and led legal campaigns, catapulting themselves to the forefront of political struggle. Thus was born the rise of lawyer-driven movements, which was to be the reigning model for progressive lawyering in the years to come. Eschewing the social conflict on which movement lawyers thrived, it sought to reconcile competing interests by representing an abstract version of *everyone*—i.e. the “public.” Liberal and conservative public interest lawyers would subsequently battle over what precisely “public interest” means.²³⁴

c. *Lawyer as Protagonist*

Without the backbone of mass organizations and in an increasingly hostile political environment, public interest lawyers became self-appointed leaders of the various causes they and their predecessors championed. In effect, public interest law became “a power base through which young, dedicated lawyers may combat and eventually control the corporate system.”²³⁵ This inverted movement lawyers’ conception of their role and relationship with their clients. Movement lawyers were animated primarily by their political and moral, not professional, commitments and saw themselves as co-equal to, indeed even lesser activists than, their street counterparts. With the ascendance of public interest lawyering, these commitments devolved into a primarily professional undertaking, with the lawyer as principal protagonist.²³⁶ As Hilbink captures:

²³¹ See KATZ, *supra* note 72, at 170-71 (discussing LSC leadership’s move away from community representation in board).

²³² See *id.* at 355 (internal citation omitted).

²³³ *Id.* at 356 (internal citation omitted).

²³⁴ See Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,”* 52 U.C.L.A. L. REV. 1223 (2005); Esquivel, *supra* note 176.

²³⁵ See Hilbink Dissertation, *supra* note 29, at 331 (quoting Bob Hernandez, *The Lurking Danger of Naderism*, N.Y. TIMES, Mar. 30, 1972, available at <http://select.nytimes.com/gst/abstract.html?res=F70C13F93C59107A93C2AA1788D85F468785F9&scp=1&sq=%22lurking%20danger%20of%20naderism%22&st=cse>).

²³⁶ See, e.g., Hilbink Dissertation, *supra* note 29, at 92-93 (discussing Lawyers Commit-

“We have been counting all along on a massive citizen-action response,” Mark Green, a public interest law stalwart, told Simon Lazarus. But there was no such response. Such a great expectation in fact occurred precisely at the time in which the new social movements began to atomize, leaving public interest lawyers as “elite agitators” without power, leaders without followers.²³⁷

It was a decisive shift in the role of the lawyer—the reclamation of an elite role and elitist approach to social change—and one that would have far-ranging and contradictory consequences for client activism, lawyer-client relationships, and the very content of progressive legal advocacy. On the one hand, as lawyers increasingly occupied the leading role in movements that were in retreat, legal advocacy correspondingly became the presumptive catalyst for client activism, instead of the reverse. This shift enabled the rise of lawyer-led organizing campaigns, which would be the subject of sharp criticism later. At their high point, the new social movements checked the usual power imbalance between lawyer and client; with their collapse, lawyers once again dominated the lawyer-client relationship. This meant the re-orientation of activism back to mainstream centers of power, in particular Washington, D.C—a reversal of the movement lawyers’ decentralized, community-based practices. As they collaborated with law schools, public interest lawyers increasingly diverted attention away from poor and working class communities and focused on institutional decisionmakers and law students.

At the same time, however, the birth of public interest law produced a new generation of left-liberal lawyers and accelerated the development of progressive lawyering theory—albeit with an overemphasis on formal legal tools. New organizations were born and multiplied rapidly. With a focus on administrative decision-making,²³⁸ Nader established the Public Interest Research Group (PIRG) in 1970—one of the first public interest law firms in the U.S. “Unlike conventional law firms, PIRG did not have specific clients, but filed petitions and sued corporations and government agencies on behalf of whatever Nader and his followers regarded as in ‘the public interest.’”²³⁹ As Hilbink observes, “‘Nader’s Raider’s’ grew quickly from a

tee for Civil Rights Under Law, whose mission “emanated from [its] *professional* orientation. It was, first and foremost, an animal of the legal profession and attempted to remain such rather than become a civil rights organization. Its purpose was to serve not the cause of civil rights, but rather the interests of ‘the law,’ for which the profession retained stewardship. The members acted out of a professional duty and responsibility rather than political or moral desire.”)

²³⁷ *Id.* at 405 (footnotes omitted).

²³⁸ See Halpern & Cunningham, *supra* note 114, at 1096.

²³⁹ KLEBANOW & JONAS, *supra* note 122, at 437.

band of five law school interns in the summer of 1967, to 100 interns in 1969, and then to 200 in 1970.”²⁴⁰ By the end of 1972, there were PIRGs on 138 college campuses with a total membership of 400,000.²⁴¹ A few years later, one survey estimated that there were about 92 public interest law centers employing almost 600 lawyers and litigating in a diversity of areas.²⁴² Today, there are approximately a thousand.²⁴³

In partnership with law schools, the public interest movement also trained—and continues to train—generations of progressive lawyers. The growth of public interest law curricula in law schools, combined with the concurrent and related rise of critical legal studies and clinical legal education, led to the development of progressive lawyering theory. The very first public interest law centers were explicitly designed to provide clinical experiences for law students—usually at elite law schools.²⁴⁴ For example, the Center for Law and Social Policy, which was founded in 1968, was a joint project with five law schools: Yale, the University of Pennsylvania, the University of California at Los Angeles, Stanford University and the University of Michigan.²⁴⁵ This is still the case. Notwithstanding its contradictions, the public interest law movement nonetheless has produced an extraordinary wealth of material for the progressive practitioner or student of law.

²⁴⁰ Hilbink Dissertation, *supra* note 29, at 329.

²⁴¹ See *id.* Nader would found Public Citizen and under it the Litigation Group the following year.

²⁴² COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 79-132 (1976); Deborah L. Rhode, *Public Interest Law: The Movement in Midlife*, 60 STAN. L. REV. 2027, 2032 (2008); see also NADER & GREEN, *supra* note 176, at 160-62 (discussing growth of public interest bar).

²⁴³ See Rhode, *supra* note 242, at 2032 (citing Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. REV. 1591 (2006)).

²⁴⁴ In the 1960s and '70s, law students demanded “social relevance” in legal education, which fueled the expansion of clinical legal education. In turn, the expansion and maturation of clinical legal education contributed enormously to reorienting progressive lawyering theory. As Dean Hill Rivkin has observed, “It was the societal legacy of the sixties . . . that most shaped clinical legal education. The fervor of the sixties penetrated law schools quite passionately.” *Symposium on Clinical Legal Education: Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337, 340 (1987). See generally Barry et al., *supra* note 29. Many programs also responded to Kinoy’s exhortation to “take on major cases and situations involving the relationship of the processes of the law to the fundamental problems of contemporary society” so as to “provide a fascinating teaching tool for probing into the most fundamental theoretical, substantive, and conceptual problems, all within the context of the throbbing excitement of reality.” Arthur Kinoy, *The Present Crisis in Legal Education*, 24 RUTGERS L. REV. 1, 7 (1969).

²⁴⁵ See Halpern & Cunningham, *supra* note 114, at 1103, n.23.

d. Role of Foundations

Private foundations played a significant role in this reorientation of progressive lawyering as well. As commentators have noted:

It cannot be overemphasized how important the availability of foundation funding has proven for the rapid development of public interest law. Not only were new groups able to form . . . but older organizations were able to expand their activities, often on a large scale, as a result of the availability of foundation funding.²⁴⁶

Rabin put it much more bluntly: "The phenomenon that made public interest law possible was the commitment of a handful of private foundations, particularly the Ford Foundation, to the new enterprise."²⁴⁷ In turn, "[t]he work of these centers quickly led to widespread acceptance of the view that administrative bodies and decision-making agencies function better when those who are affected are adequately represented before them."²⁴⁸ The Ford Foundation funded the Sierra Club Legal Defense Fund, the Natural Resources Defense Council, Citizens Communication Center, the Mexican American Legal Defense Fund, the Center for Law and Social Policy, Public Advocates, and the Center for Law in the Public Interest.²⁴⁹

Foundations also played a critical role in the maturation and institutionalization of clinical legal education. "From 1959 to 1965, the Ford Foundation provided intermittent grants totaling \$500,000 to nineteen law schools through . . . the National Council on Legal Clinics (NCLC)."²⁵⁰ In 1965, it "made an additional grant of \$950,000 . . . and [the] NCLC was renamed the Council on Education in Professional Responsibility (COEPR), and then later renamed Council on Legal Education for Professional Responsibility (CLEPR) in 1968."²⁵¹ Thereafter, from 1968-1978, it "granted an additional \$11 million to CLEPR . . . [which] awarded 209 grants to 107 ABA-approved law schools, totaling approximately \$7 million."²⁵²

²⁴⁶ COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 242, at 41; *see also* LEE EPSTEIN, TRACEY E. GEORGE & JOSEPH F. KOBYLKA, PUBLIC INTEREST LAW: AN ANNOTATED BIBLIOGRAPHY AND RESEARCH GUIDE 13-14 (1992) (availability of funding accounted for growth of public interest organizations). According to Epstein, George and Kobylka, the Supreme Court decisions allowing civil rights attorneys to recover attorneys' fees also accounted for the increase in the number of public interest organizations. *Id.* at 14-15.

²⁴⁷ Rabin, *supra* note 217, at 260. Hilbink also observes that "[w]hile Ford was not new to the legal field in the late 1970s, prior to [McGeorge] Bundy's arrival, the foundation had provided no support for groups using litigation in the field of civil rights." Hilbink Dissertation, *supra* note 29, at 358 (internal citation omitted).

²⁴⁸ COUNCIL OF PUBLIC INTEREST LAW, *supra* note 242, at 58.

²⁴⁹ *See* Rabin, *supra* note 217, at 228-29.

²⁵⁰ Barry et al., *supra* note 29, at 18-19.

²⁵¹ *Id.*

²⁵² *Id.*

When the Ford Foundation stopped supporting CLEPR and clinical legal education, the Department of Education took over. From 1978-97, Congress appropriated more than \$87 million to the endeavor. As commentators have noted:

If the nearly \$13 million from the Ford Foundation was instrumental in jump-starting clinical legal education in most of the law schools in the United States during the first twenty years of the second wave of clinical legal education, then the \$87 million from the Title IX program over the last twenty years of the second wave of clinical education was responsible for developing these budding clinical programs into integral parts of the curriculum at almost every law school in the United States. While there were and continue to be other sources of private foundation and government funds for clinical legal education programs, no other external funding programs have been as important to the proliferation of clinical legal education programs as the Ford Foundation and Title IX programs. By the end of the Title IX program in September of 1997, there were real-client in-house law school clinical programs in at least 147 law schools.²⁵³

At the same time, representatives of the practicing bar were calling for greater emphasis on lawyering skills and professional values as taught in clinical courses.²⁵⁴

The Ford Foundation's objective was to relegitimize "the System." McGeorge Bundy, the National Security Advisor to Presidents Kennedy and Johnson—and principal architect of the Vietnam War—who became Ford Foundation President in 1966, saw the survival of capitalism and, as one commentator put it, "of the democratic process in the United States," as his main objective.²⁵⁵ Again, Hilbink: "the vetting process at Ford made extra sure that public interest lawyers would not do something unpalatable to the establishment. Thus did they keep public interest law firmly in the center *defending the system*."²⁵⁶

e. Birthing Pains

The political shift did not come easily. Halpern spoke of an atmosphere of "distrust" during a two-day working seminar between poverty and public interest lawyers in early 1971, in which the former attacked the latter for catering to the middle class and siphoning resources away from the poor.²⁵⁷ In one meeting, George Wiley, the

²⁵³ *Id.* at 19-20.

²⁵⁴ *See id.* at 20.

²⁵⁵ *See* Hilbink Dissertation, *supra* note 29, at 358.

²⁵⁶ *Id.* at 381(emphasis added).

²⁵⁷ *See* Charles R. Halpern, *Public Interest Law: Its Past and Future*, 58 JUDICATURE 118

founder of the NWRO, “made it vehemently clear that he viewed environmentalists [whose cause public interest lawyers championed] more as enemies than as allies . . . [t]he only thing peaceful about the meeting was the landscape.”²⁵⁸ So different was the notion of public interest lawyering from people’s or poverty lawyering that, as late as 1970, Senator Edward Kennedy observed that “we were able to fit almost the entire public interest bar of Washington around a single table.”²⁵⁹ In time, however, the LSC—and many poverty lawyers—caved in and followed suit by “changing ideological course, explicitly denounc[ing] the goal of ‘achieving social change.’”²⁶⁰

5. *Critical Legal Studies, Clinical Legal Education, and the Constitutive Theory of Law*

Parallel developments occurred in the academy. William Simon observes how a “growing frustration and demoralization” in the face of declining political activism and militancy drove many activist lawyers to law teaching, particularly in clinics.²⁶¹ As a result, two progressive projects emerged: critical legal studies (CLS) and clinical legal education. “While clinical teachers were working with law students to use the law as an instrument for social justice and change,” write Margaret Martin Barry, Jon Dubin and Peter Joy, “proponents of CLS were using the classroom to demystify the law and to teach students that ‘political conviction’ plays an important role in adjudication and that the shape of the law at any time reflects ideology and power as well as what is wrongly called ‘logic.’”²⁶² Even though these move-

(1974).

²⁵⁸ NADER & GREEN, *supra* note 176, at 158. See also Halpern & Cunningham, *supra* note 114, at 1107. The debate centered on the new public interest firms’ siphoning resources from organizations that served people of color and the poor. Critics of the new public interest lawyers argued that the issues they espoused were “middle class” issues, which could be solved through “majoritarian politics” – *i.e.* Congress. The concerns of minorities and the poor, by contrast, were not a concern to the majority. See also Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession? – The Public Interest in Public Interest Law*, 79 YALE L. J. 1005 (1969-70) (criticizing public interest law as diverting resources from poor Blacks to “middle-class, white concerns”).

²⁵⁹ See NADER & GREEN, *supra* note 176, at 161; see also Halpern & Cunningham, *supra* note 114, at 1114 (“public interest bar is very small; the entire membership . . . in Washington, where most public interest firms are presently based, can – and frequently does – assemble comfortably in one modest-sized room.”).

²⁶⁰ See Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173, 180 (2001).

²⁶¹ See Simon, *supra* note 29, at 556.

²⁶² Barry et al., *supra* note 29, at 13. The Conference on Critical Legal Studies surfaced in 1976, led by such scholars as Roberto Unger, Duncan Kennedy, Peter Gabel and Mark Tushnet. See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991). For a succinct description of the CLS movement, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW & JURISPRUDENCE AT CENTURY’S END* 106-127 (1996).

ments arose at around the same time and “grew out of the same zeitgeist,” according to one commentator, “clinical teachers and critical theorists have never quite found common cause or joined forces” to the extent one might have hoped or expected.²⁶³ On the one hand, CLS proponents leveled a powerful indictment against the neutrality of legal doctrine. “As CLS proponents exposed the politicized nature of legal doctrine in order to create space for the discussion of alternative institutional arrangements,” Cummings and Eagly explain,

they simultaneously laid the groundwork for a new orientation toward social change practice that privileged mass mobilization over law reform efforts. The CLS contention that the law merely codified the outcome of struggles over political power supported the view that real institutional change was possible only through direct action.²⁶⁴

On the other hand, critiquing CLS for lacking practical application,²⁶⁵ many legal clinicians deemphasized direct political activism and favored a professional orientation trained on legal practice and the lawyer-client relationship. “[U]nlike some CLS adherents whose critique of law and the legal system leads them to skepticism and nihilism,” noted Barry, Dubin and Joy, “clinical faculty struggled to maximize law’s potential for remedying injustice and inequity.”²⁶⁶ At many schools, CLS became primarily the province of “politics,” while clinical education concerned itself with “practice.”

Notwithstanding these divergent orientations, both camps confronted a political reality hostile to activism. This drove the CLS movement further into political and legal theory and the clinical legal education movement further into lawyering practice—a formal bifurcation that lasted until quite recently: no formal dialogue would occur between these two groups until the AALS conference in January 2004.²⁶⁷

This is not to say, however, that the CLS movement was completely divorced from practice—hence the term “critical lawyering.”

²⁶³ Minna J. Kotkin, *Creating True Believers: Putting Macro Theory into Practice*, 5 CLIN. L. REV. 95, 99 (1998).

²⁶⁴ Cummings & Eagly, *supra* note 4, at 453.

²⁶⁵ See MINDA, *supra* note 262; Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201 (1999) (discussing need for critical race praxis); see also Kotkin, *supra* note 263, at 100.

²⁶⁶ Barry et al., *supra* note 29, at 13.

²⁶⁷ See Katherine Hessler, *Theory Meet Praxis: The Impact of Clinical Legal Theory on Lawyering Strategy and Experiential Learning*, 3 SEATTLE J. FOR SOC. JUST. 429 (2004). But see Phyllis Goldfarb, *Theoretics of Practice: The Integration of Progressive Thought and Action: Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L. J. 717 (1992) (discussing similarities between Critical Legal Studies and clinical legal education and arguing for CLS-based clinical practice).

Nor was clinical legal education—and in particular lawyering theory, which it forged and continues to develop—uninformed by critical theory. To the contrary, many clinicians explicitly sought to put critical legal theory into practice.²⁶⁸ Indeed, a cornerstone of clinical practice has always been the understanding that law is “constitutive” of the social order.

In an influential article, Karl Klare argued that law did not only express the will of the ruling class or protect capitalism during crisis, but rather “contributed to defining what the character of capitalism would become and creat[ed] the institutional social relationships of the late capitalist workplace.”²⁶⁹ Lawyers should thus “conceive of law-making as, *in theory*, a form of expressive social practice in which the community participates in shaping the moral, allocative and adjudicatory texture of social life, [even though] in class society, this process is alienated.”²⁷⁰ He urged: “We must not confuse the concept of law with the historically specific forms that law assumed with the rise of capitalism.”²⁷¹ As he argued:

The purely instrumental pursuit of client interest cannot serve as an adequate model of political lawyering. We must begin to see our work, our relationship to our clients, our self-definition in counseling and in the courtroom, as itself part of the process of articulating and foreshadowing the legal forms of the future. The fact that we must live and work within alien institutions we do not control, which do not permit us collectively to guide our own destiny, ought not prevent us from conceiving of our own participation in the legal process to the extent possible as an experiment in the possibility of our freedom. This cannot but make us better, more sensitive and more political lawyers, and help us to avoid the long-term occupational hazards of ‘radical lawyering’: the slide into reformism or cynicism.²⁷²

With the ascendancy of public interest lawyering, which sought to re-legitimize rather than challenge the economic, political and social order, this constitutive theory of law became the theoretical basis for the reformist project of perfecting, rather than overthrowing, the law of capitalism.

²⁶⁸ See Buchanan & Trubek, *supra*, note 5; Goldfarb, *supra* note 267; Tremblay, *supra*, notes 38 and 87.

²⁶⁹ See Klare, *supra* note 1, at 131.

²⁷⁰ *Id.* at 132.

²⁷¹ *Id.* at 134.

²⁷² *Id.* at 135.

C. 'On the Margins': The 'New Right' and Critical Lawyering in the 1980s

The right-wing backlash that began in the mid-1970s crystallized in Ronald Reagan's election to the presidency in 1980, which forged a Republican "New Right" coalition that would dominate American politics for the rest of the century. Among the policies the new Republican coalition cemented:

a reversal in the composition of the federal courts that . . . limited liberal rights claims; a weakening of the regulatory power of administrative agencies; the decline of the welfare state; major restrictions on the federal legal services program; and, most recently, the restriction of civil rights and civil liberties, particularly for noncitizens, in the name of counterterrorism.²⁷³

The Democratic Party's collusion with key elements of this program bolstered this onslaught on progressive lawyers' clientele, pushing progressive lawyering, in the words of White and others, to "the margins."²⁷⁴ At the same time, conservative law groups challenged liberal dominance of the public interest law field.²⁷⁵ Challenging public interest law's approach to lawyering—particularly its reliance on litigation and policy advocacy and inattention to the ways in which it actively discouraged (and made more difficult) client activism—progressive lawyering theory refocused inward, to raising political consciousness among clients, and looked outward, to inspiring struggles abroad, in the hopes of renewing social struggle in the United States. Despite opposition to the conservative backlash, however, progressive politics—and therefore progressive lawyering theory—would remain marginalized in the Reagan era.

1. Reaganism

The fawning eulogies Ronald Reagan received upon his death in June 2004 bore little resemblance to the man who personified the broad-scale attack against progressive lawyers' clientele in the 1980s. Under Reagan, U.S. domestic and international policy became a bare-knuckled assault on the constituencies that propelled the mass activism of the previous era: the poor, the working class, women, people of color, immigrants, gays and lesbians and anti-war activists. Among other policies, Reagan supported racist, dictatorial regimes abroad, slashed social spending, and attacked progressive and liberal lawyers, in particular, Legal Services lawyers.

Reagan, argued *The Nation* magazine, "was the worst American

²⁷³ Cummings, *supra* note 25, at 66.

²⁷⁴ See, e.g., White, *Mobilization on the Margins*, *supra* note 98.

²⁷⁵ See O'Connor & Epstein, *supra* note 199; Southworth, *supra* note 234.

leader since Herbert Hoover.”²⁷⁶ In foreign policy:

After Democrats and Republicans in Congress passed sanctions against the apartheid government of South Africa, Reagan vetoed the measure. His administration cuddled up with the fascistic and anti-Semitic junta of Argentina and backed militaries in El Salvador and Guatemala that massacred civilians. It moved to normalize relations with Augusto Pinochet, the tyrant of Chile. Reagan sent George Bush the First to the Philippines, where the Vice President toasted dictator Ferdinand Marcos for fostering “democracy.” Pursuing a quasi-secret war against the Sandinista government in Nicaragua, the Reagan Administration violated international law and circumvented Congress to support contra rebels engaged in human rights abuses and, according to the CIA’s own Inspector General, worked with suspected drug dealers. Reagan covertly sent arms to the mullahs of Iran and courted Saddam Hussein, even after his use of chemical weapons. He appointed officials who claimed nuclear war was winnable, thus raising the chances that miscalculations by the Soviet Union or the United States would plunge the world into chaos.²⁷⁷

Domestically, Reagan expressed deep hostility to the gains of the civil rights movement.²⁷⁸ Economically, “Reagonomics,” or what his successor George H.W. Bush (Bush I) described as “voodoo economics,” lavished tax cuts on the rich at the expense of the poor.²⁷⁹ During Reagan’s two terms, the official poverty rate remained at 12.8 percent.²⁸⁰ Sending a message to unions and prefiguring his labor policy, Reagan fired 10,000 striking air traffic controllers upon assuming office.²⁸¹ He deregulated and privatized the state sector, cut welfare and social spending, started the “wars” on crime and drugs, opposed abortion rights, and disregarded the AIDS pandemic.²⁸² These policies

²⁷⁶ See Editorial, *The Reagan Legacy*, THE NATION, June 28, 2004, available at <http://www.thenation.com/doc/20040628/editors>.

²⁷⁷ *Id.*

²⁷⁸ See, e.g., NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988); George J. Church, Ted Gup & Barrett Seaman, *A Futile Veto on Civil Rights*, TIME, Mar. 28, 1988, available at <http://www.time.com/time/magazine/article/0,9171,967068,00.html>; John Herbers, *Reagan’s Changes on Rights Are Starting to Have Impact*, N.Y. TIMES, Jan. 24, 1982, at 1; Howell Raines, *Reagan Sends Mixed Signal on Civil Rights*, N.Y. TIMES, July 16, 1981, at A1; Stuart Taylor, *Marshall Puts Reagan at “Bottom” Among Presidents on Civil Rights*, N.Y. TIMES, Sept. 9, 1987, at A1.

²⁷⁹ See BBC News, *Reagonomics or ‘Voodoo Economics’?* June 5, 2004, <http://news.bbc.co.uk/2/hi/americas/270292.stm>.

²⁸⁰ See U.S. Census Bureau, Poverty, Historical Poverty Tables, Table 2. Poverty Status of People by Family Relationship, Race, and Hispanic Origin: 1959 to 2006, <http://www.census.gov/hhes/www/poverty/histpov/hstpov2.html> (last visited Sept. 13, 2009).

²⁸¹ See, e.g., Robert D. McFadden, *Controllers Strike, Halting 7,000 Flights: Reagan Gives 48-Hour Notice of Dismissal*, N.Y. TIMES, Aug. 4, 1981, at A1.

²⁸² See, e.g., Neal Devins, *Through the Looking Glass: What Abortion Teaches Us about American Politics*, 94 COLUM. L. REV. 293, 301 (1994); David A. Domansky, *Abusing*

have had disastrous consequences. For example, the United States now imprisons more people than any other country on the planet (one out of every 99 Americans is in prison²⁸³) and has no abortion services in more than three out of four counties.²⁸⁴

On the legal front, Reagan's attitude towards liberal and progressive lawyers is best summarized by his dismissal of legal services lawyers as "a bunch of ideological ambulance chasers doing their own thing at the expense of the poor who actually need help."²⁸⁵ Reagan repeatedly sought to eliminate the LSC.²⁸⁶ Bush I, who lost to Reagan in the Republican primaries of 1980, extended most of these policies, including ordering military operations against Panama and starting the first Gulf War in 1991.²⁸⁷

2. *Fragmentary Flashpoints: The Absence of Sustained Mass Opposition*

Reagan's and Bush I's policies met with strong opposition. Throughout the 1980s, hundreds of thousands protested against U.S. military intervention in Central America—in particular El Salvador and Nicaragua;²⁸⁸ U.S. support for South Africa's apartheid regime;²⁸⁹ nuclear proliferation;²⁹⁰ deep cuts in social programs and changes in

Standing: Furthering the Conservative Agenda, 29 WM. & MARY L. REV. 387, 391-392 (1988); Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 525 (1990).

²⁸³ See Roy Walmsley, International Centre for Prison Studies: World Prison Population List (8th ed.), http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf (last visited June 9, 2009).

²⁸⁴ See Guttmacher Institute, *In Brief: Facts on Induced Abortion in the United States*, July 2008, http://www.guttmacher.org/pubs/fb_induced_abortion.html.

²⁸⁵ Michael S. Greve, *Why 'Defunding the Left' Failed*, 89 NAT'L AFFAIRS (1987), http://www.nationalaffairs.com/doclib/20080708_1987897whydefundingthelleftfailedmichaelsgreve.pdf (last visited Sept. 17, 2009).

²⁸⁶ See David S. Jackson & Michael S. Serrill, *An Organization at War with Itself*, TIME, Oct. 3, 1983; Evan Thomas & Bennett H. Beach, *One More Narrow Escape*, TIME, Nov. 23, 1981.

²⁸⁷ See *Fighting in Panama: The President; A Transcript of Bush's Address on the Decision to Use Force in Panama*, N.Y. TIMES, Dec. 21, 1989, at A19; Andrew Rosenthal, *War in the Gulf: The Overview, Bush Demands Iraq Start Pullout Today Despite Its Assent to 3-Week Soviet Plan; Oilfields and Trenches Aflame in Kuwait, Ground War Vowed*, N.Y. TIMES, Feb. 23, 1991, at 1; Andrew Rosenthal, *War in the Gulf: The President; Bush Halts Offensive Combat; Kuwait Freed, Iraqis Crushed*, N.Y. TIMES, Feb. 28, 1991, at. A1.

²⁸⁸ See, e.g., Stephen Engelberg, *Thousands Protest in Washington*, N.Y. TIMES, Apr. 21, 1985, at 22; Nathaniel Shappard, Jr., *Antiwar Coalition Plans Protests on Diverse Interests*, N.Y. TIMES, May 24, 1981, at 30; Mary Tabor, *Marchers Protest Aid to El Salvador*, BOSTON GLOBE, Nov. 20, 1989, at 17; Martin Tolchin, *Thousands in Washington March to Protest U.S. Policy in El Salvador*, N.Y. TIMES, Mar. 28, 1982, at 18.

²⁸⁹ See, e.g., Associated Press, *Thousands Rally in Newark to Protest Apartheid Policy*, N.Y. TIMES, Nov. 10, 1985, at 29; Crystal Nix, *Many in U.S. Protest on South Africa*, N.Y. TIMES, Oct. 12, 1985, at 11.

²⁹⁰ See, e.g., Associated Press, *1,100 Antinuclear Protesters Arrested*, N.Y. TIMES, Oct.

job safety rules;²⁹¹ the administration's policies on civil rights,²⁹² AIDS,²⁹³ women, abortion,²⁹⁴ homelessness²⁹⁵ and others.²⁹⁶ There was also significant strike activity in this period.²⁹⁷

25, 1983, at A20; Associated Press, *Thousands Stage Protest*, N.Y. TIMES, May 12, 1987, at A22; Ben Franklin, *Labor Rift Accompanies Three Mile Island Protest*, N.Y. TIMES, Mar. 29, 1981, at 28; Paul L. Robert Lindsey, *Almost 1,000 Arrested in Nuclear Weapons Protest*, N.Y. TIMES, June 21, 1983, at A14; Paul L. Montgomery, *Throngs Fill Manhattan to Protest Nuclear Weapons*, N.Y. TIMES, June 13, 1982, at 1.

²⁹¹ See, e.g., THOMAS R. PEAKE, KEEPING THE DREAM ALIVE: A HISTORY OF THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE FROM KING TO THE NINETEEN-EIGHTIES 381 (1987); *260,000 in Capital Rally for Protest to Reagan's Policies*, N.Y. TIMES, Sept. 20, 1981, at 1.

²⁹² See, e.g., PEAKE, *supra* note 291, at 396-97; Kenneth B. Noble, *March in Capitol Is Seen Spurring Vast Coalition*, N.Y. TIMES, Aug. 29, 1983, at A12; *Thousands March in Civil Rights Protest*, ST. LOUIS POST-DISPATCH, Aug. 27, 1989, at 6B; see also *Thousands Turn Out for Georgia Racial Protest*, CHRISTIAN SCIENCE MONITOR, Jan. 26, 1987, at 2.

²⁹³ See, e.g., Bruce Lambert, *3,000 Assailing Policy on AIDS Ring City Hall*, N.Y. TIMES, Mar. 29, 1989, at B3; Robert Manor, *Protest Holds Up Start of AIDS Conference*, ST. LOUIS POST-DISPATCH, June 5, 1989, at 7A; Thom O'Connor, *Candle-light Demonstration for Federal Funding of AIDS Research*, N.Y. TIMES, May 3, 1983, at B4; *Protesters Disrupt Mass in New York*, ST. LOUIS POST-DISPATCH, Dec. 11, 1989, at 9A; David Tuller, *60 Arrests at AIDS Rally in SF*, S.F. CHRONICLE, Oct. 7, 1989, at C10.

²⁹⁴ See, e.g., Associated Press, *12 Illinois Women Jailed for Equal Rights Protest*, N.Y. TIMES, Jul. 3, 1982, at 6; Associated Press, *150 Arrested at Pentagon In Protest by 1,300 Women*, N.Y. TIMES, Nov. 18, 1980, at A18; *10 Women Arrested After Scaling Fence to White House Grounds*, N.Y. TIMES, Feb. 16, 1982, at A12; *Feminists Arrested in Washington*, N.Y. TIMES, Aug. 27, 1981, at A14; Ethan Bronner, *Throngs Rally in D.C. to Keep Abortion Legal; 'Political Army' Vows Action*, BOSTON GLOBE, Apr. 10, 1989, at 1; Nathaniel Sheppard, Jr., *Women Say They'll End Fast But Not Rights Fight*, N.Y. TIMES, June 24, 1982, at A16; United Press International, *Feminists Rally on Abortion*, N.Y. TIMES, June 9, 1985, at 28; Evelyn C. White, *A Huge, Spirited Abortion-Rights Rally in SF*, S.F. CHRONICLE, Oct. 16, 1989, at A1; but see Associated Press, *Thousands Rally Against Abortion*, N.Y. TIMES, Jan. 24, 1984, at A8; United Press International, *Demonstrations Mark 10 Years of Legal Abortion*, N.Y. TIMES, Jan. 23, 1983, at 18. See also Polikoff, *supra* note 5, at 444-445.

²⁹⁵ See, e.g., Allan R. Gold, *March on Washington in Protest Against Homelessness*, N.Y. TIMES, Oct. 8, 1989, at 24.

²⁹⁶ See, e.g., David W. Dunlap, *Fifth Avenue Marchers Celebrate Labor and Demand Work for All*, N.Y. TIMES, Sept. 7, 1982, at A1; Michael Oreskes, *100,000 March Up Fifth Avenue to Celebrate Centennial of Labor*, N.Y. TIMES, Sept. 8, 1981, at A1; Lena Williams, *600 in Gay Demonstration Arrested at Supreme Court*, N.Y. TIMES, Oct. 14, 1987, at B8 (protesting Supreme Court's decision in *Bowers v. Hardwick*).

²⁹⁷ United States Department of Labor, Bureau of Labor Statistics, *Work Stoppages Involving 1,000 or More Workers, 1947-2008*, Feb. 11, 2009, <http://www.bls.gov/news.release/wkstp.t01.htm> (showing significant decrease in strike activities from previous decades, but significant activity during the years 1980-81, 1983, 1986 and 1989); see also Associated Press, *4,000 More Strikers Return as Casino Pacts Continue*, N.Y. TIMES, June 8, 1984, at A14; Associated Press, *Minnesota State Workers Strike for Contract*, N.Y. TIMES, July 21, 1981, at B8; Samuel G. Freeman, *Congestion Growing on 2d Day of Metro-North Strike*, N.Y. TIMES, Mar. 9, 1983, at B2; Les Ledbetter, *16,000 Workers At Con Edison Go Out on Strike*, N.Y. TIMES, June 18, 1983, at 25; Andrew H. Malcolm, *Walkout Snarls Travel and Industry*, N.Y. TIMES, Sept. 21, 1982, at B8; Robert D. McFadden, *All Travel Free as Metro-North Resumes Service*, N.Y. TIMES, Apr. 19, 1983, at B1; McFadden, *supra* note 268; Michael Oreskes, *Uniformed Unions Rally to Protest City's Wage Offer*, N.Y. TIMES, July 8,

Despite these organizing efforts, however, no sustained mass opposition emerged. Mike Davis sought to explain this absence:

The . . . fragmentation of the class structure facilitated the recombination of politics around the selfishly 'survivalist' axis favored by the New Right: The complexity of the 'restratification' of the working class has aggravated the tendency in American politics for class issues to become lost in a welter of sectoral and stratum divisions. This, in turn, has helped promote a politics that is not only more than usually self-interested and short-sighted, but also centered increasingly on a narrowed range of 'social' issues, especially those of home and family. Where relative prosperity or impoverishment may hang on the timing of a house purchase or the fact of working in (say) the aerospace rather than the auto industry or having been born in 1940 rather than 1950, the sense of commonality of experience and needs disintegrates.²⁹⁸

Julie Bindell, Kate Cook and Liz Kelly expressed the sentiment of many activists when they observed that "[t]he 1980s were a period of uncertainty and loss of faith for feminist activism. The impact of simplistic identity politics fuelled divisions among women, and created tension and mistrust."²⁹⁹

"How does one function as a lawyer for the people when there appears to be no immediate prospect of struggle other than in the arena of formal legal defense?" lamented Kinoy. "If the driving motivation of a people's lawyer ought to be the use of skills and legal techniques to help create an atmosphere in which the people themselves can better organize, function, and move forward, how does one meet this responsibility when the people's movements seem to have lost their own sense of struggle?"³⁰⁰

3. *Pessimism and Turn Inward*

As the 1980s progressed, progressive lawyering theorists answered Kinoy's question by simultaneously looking inward and to "the margins."³⁰¹ Realizing the limits of formal, institutionalized reform under hostile political conditions and an arid organizing landscape, progressive lawyers sought to rebuild client activism by

1982, at A1; Damon Stetson, *Greyhound Strikers Receive Backing from Other Unions*, N.Y. TIMES, Nov. 24, 1983, at A16.

²⁹⁸ DAVIS, *supra* note 174, at 178.

²⁹⁹ Julie Bindell, Kate Cook & Liz Kelly, *Trials and Tribulations—Justice for Women: A Campaign for the 1990s in FEMINIST ACTIVISM IN THE 1990s*, at 65 (Gabrielle Griffin, ed., 1995).

³⁰⁰ Kinoy, *supra* note 33, at 90.

³⁰¹ White, *supra* note 98 (using these words to describe use of litigation in educating and mobilizing clients); *see also* Bachmann, *supra* note 15, at 4 ("role that lawyers play in the development and articulation of value and law in society is rather marginal").

concentrating on its ideological dimensions. Promising political movements abroad, too, provided a source for inspiration, strategy and tactics. Ironically, the pessimism wrought by the Reagan/Bush era birthed a necessary complement to progressive lawyering theory. Heretofore, scholars had focused primarily on the political economy (movement lawyers) and legal system (public interest lawyers). With a constricted political landscape, however, the theoretical lens narrowed and shifted to lawyering and the lawyer-client relationship.³⁰² The theoretical turn was, at bottom, about reclaiming the centrality of client activism. Even though the focal shift led to a preoccupation with the lawyer's role and dangers of lawyer domination, the renewed attention to the lawyer and lawyer-client relationship also induced lawyers to use legal tactics more creatively to catalyze such activism.

a. *Ideological Turn*

The focus on the ideological dimension of political activism was an unavoidable turn for progressive lawyers in this period. With the possibility of actual activism delimited by hostile political conditions, they had no choice but to use the granular, professional interactions in which they took part to concentrate on the precursor for political mobilization: raising political consciousness. In the 1980s, scholars exhorted clients to “refus[e] to succumb,”³⁰³ “reimagine the world,”³⁰⁴ and look to the “power of consciousness”³⁰⁵ in defending against right-wing policies. While the goals remained the same—the abolition of poverty, for example—the strategy, under these circumstances, summarized by Anthony Alfieri in 1987, was to “empower[] the poor” through “dialogue.”³⁰⁶

Yet the theoretical transformation went further. The pessimism³⁰⁷

³⁰² See Simon, *supra* note 29 (discussing ideological shift from economic and sociological to psychological, therapeutic paradigm in lawyering).

³⁰³ See David Hoffman, *The Politics of Lawyering*, 20 HARV. C.R.-C.L. L. REV. 269, 279 (1985).

³⁰⁴ See *id.* at 280.

³⁰⁵ See *id.*

³⁰⁶ See Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 665 (1988).

³⁰⁷ See HANDLER, *supra* note 14, at 233 (“law reform activity by social-reform groups will not result in any great transformation of American society. . . [and] will not disturb the basic political and economic organization of modern American society”); Bachmann, *supra* note 15, at 4 (“[t]he role that lawyers play in the development and articulation of value and law in society is rather marginal”); Gabel & Harris, *supra* note 38, at 369 (“[m]ost lawyers on the left have a pessimistic view of their own political role in bringing about fundamental social change”); White, *Creating Models*, *supra* note 79, at 304 (“most of my work is pretty gloomy”); Fred C. Zacharias, *Five Lessons for Practicing Law in the Interests of Justice*, 70 FORDHAM L. REV. 1939, 1940 (2002) (“lawyers – even well-meaning lawyers – must accept our own insignificance”).

wrought by the ascendancy of the New Right pierced through the core of the progressive lawyering project, changing fundamental premises and aims. Even though the movement and public interest lawyers differed on whether to seek revolution or reform, at an elementary level both traditions saw the problem as the excesses of capitalism and the state. Influenced by “post-modernism” and “neo-Marxism,” progressive scholars in the 1980s began redefining the problem in terms more abstract, as one of “hierarchy” and “subordination.”³⁰⁸ Classical Marxism, some of these scholars argued, reduced social issues to economic or structural factors, and focused too much on the state. In contrast, while not disregarding the economy, “neo-Marxist theory place[d] much greater emphasis on the role of social alienation in shaping the contours of social life and argue[d] for a theory of politics that makes the overcoming of alienation a central political objective.”³⁰⁹

From this perspective, the progressive lawyer’s role was to demystify the legal process. In the 1980s, scholars began to argue that *all* hierarchy and subordination were the problem. (This, in turn, would become the basis for the critique by some that lawyers, in their position of power over their clients, necessarily oppress them.) “A first principle of ‘counter-hegemonic’ legal practice must be to subordinate the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness,” argued Peter Gabel and Paul Harris.³¹⁰ Gabel and Harris argued that progressive lawyers in every case should be guided by three major objectives: developing a genuinely equal and respectful relationship with their clients; demystifying the symbolic authority of the state; and reshaping legal conflicts by “revealing the limiting character of legal ideology and bringing out the true socioeconomic and political foundations of legal disputes.”³¹¹ They explained:

The predominance of hierarchy in both public and private life leads to a profound loss of this sense of social connection because it breaks down any possibility of real community, and forces people into a life-long series of isolating roles and routines within which they are unable to fully recognize one another in an empowering and mutually confirming way. Instead, people come to experience one another as powerless and passive in relation to the hierarchies within which they live and work, and, because this collective powerlessness is manifested throughout the social order, individuals internalize this powerlessness in the formation of themselves. Alien-

³⁰⁸ See Gabel & Harris, *supra* note 38; White, *To Learn and Teach*, *supra* note 39.

³⁰⁹ See Gabel & Harris, *supra* note 38, at 371.

³¹⁰ *Id.* at 375.

³¹¹ See *id.* at 376.

ation and powerlessness therefore become a self-generating source of social repression that leads to the reproduction of class, race and sex hierarchies from generation to generation.³¹²

White argued for a method she called “third-dimensional lawyering,”³¹³ which would combine the teachings of Paulo Freire with the feminist methodology of consciousness-raising.³¹⁴ Third-dimensional lawyering, she explained, was a way “to design context-specific acts of public resistance, which work, not by overpowering the oppressor, but by revealing the wrongness and vulnerability of its positions to itself and to a wider public.”³¹⁵ Echoing many of the prescriptions made by their predecessors, this generation of scholars argued for lawyers to develop genuinely equal and mutually respectful relationships with their clients, and involve them in legal advocacy, practicing in such a way as to demystify the symbolic authority of the state, and “politicizing” cases.³¹⁶

In some cases, the shift led to the disregard of real, objective realities. Some, like Gabel and Harris, even went so far as to dismiss the importance of rights, and counterpose them to the struggle for “power,” arguing that “hierarchies of the legal system are sustained *only* by people’s belief in them”—a claim patently at odds with the real force (and violence) that compelled participation in the legal system.³¹⁷ Indeed, even at the height of the new social movements in the 1960s and ‘70s, circumstances in which the courtroom was or could be used as a political platform were rare.³¹⁸ Using courts to empower clients, as Gabel and Harris argued, was, at best, limited.

b. *Lawyering Theory*

Nonetheless, the shift paved the way for the theorizing of lawyer-client relations to a degree theretofore foreign to the progressive law-

³¹² *Id.* at 371.

³¹³ See White, *To Learn and Teach*, *supra* note 39. It should be noted, however, that White demurred from calling her approach a “theory” of lawyering. *Id.* at 746 (“I do not offer this three-tiered schema as a ‘theory’ of social change lawyering”).

³¹⁴ See *id.* at 760.

³¹⁵ *Id.* at 763.

³¹⁶ See, e.g., White, *Creating Models*, *supra* note 79, at 309 (cause lawyers “always seek[] to activate political action, and thus build the capacity for more powerful political intervention”).

³¹⁷ See Gabel & Harris, *supra* note 38, at 374. For critiques of this approach, see Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589 (1986); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

³¹⁸ See Hilbink Dissertation, *supra* note 29, at 293 (internal citation omitted). According to Hilbink, only the Chicago Eight, Oakland Seven and Panther 21 trials garnered national media attention. See *id.* at 294.

ying project. In looking to the inspirational struggles against Apartheid in South Africa, White's detailed description of a lawyer-organizer partnership produced invaluable insight on the process.³¹⁹ White also talked about the ad-hoc use of litigation as a way to mobilize clients, arguing that litigation could provide opportunities for education and motivation.³²⁰ Richard Klawiter discussed similar work with campesinos in El Salvador.³²¹ White talked about "parallel spaces" in which lawyers engaged clients in transformative dialogue.³²² Bachmann looked to the histories of the labor and civil rights movements in the 1930s and '60s as examples, as did Gabel and Harris, who argued that "honest spontaneity and moral authenticity" could alter their clients' circumstances.³²³ The struggles of the 1930s and '60s bore lessons, of course. But they occurred in periods very much unlike the 1980s.

Thus, the turn inward laid the seeds for both a preoccupation with an internal or ideological method for catalyzing social struggle and a localized—almost personalized— delimited approach to legal activism. Both these trends laid the basis for the profession-blaming that would be notorious in the field some years later.

D. 'Rebellious': Neoliberalism and Postmodernist Lawyering in the 1990s

From the standpoint of progressive lawyers' clientele, Bill Clinton's election to the presidency in 1992 initially seemed promising. Clinton won the election on the pledge that he would, among other things, change the Reagan-Bush I Administrations' "12 years of trickle-down economics," pass universal health care and pursue a humane foreign policy.³²⁴ Instead, the two terms of the Clinton Administration represented more continuity than break from the policies of the Reagan/Bush I Administrations. As Lance Selfa put it, the Clinton-Gore Administration "hid its pro-corporate agenda behind a fog of populist rhetoric."³²⁵ He continued: "Public disappointment ran so high that the 1994 election delivered the Congress—a Democratic bastion for 60 years—into the hands of the Gingrich Republicans."³²⁶

³¹⁹ See White, *To Learn and Teach*, *supra* note 39.

³²⁰ See White, *supra* note 98.

³²¹ See Richard F. Klawiter, *La Tierra Es Nuestra! Campesino Struggle in El Salvador and a Vision of Community-Based Lawyering*, 42 STAN. L. REV. 1625 (1990).

³²² See White, *supra* note 98, at 546.

³²³ See Gabel & Harris, *supra* note 38, at 405.

³²⁴ See, e.g., Lance Selfa, *The Price of Lesser Evilism: Eight Years of Clinton-Gore*, 13 INT'L SOCIALIST REV. 7 (2000).

³²⁵ *Id.*

³²⁶ *Id.*

Progressive lawyering theory blossomed during the 1990s. Buoyed perhaps by more promising signs of grassroots organizing, this period saw a proliferation of scholarship aimed specifically at reactivating client activism. However, the influence of post-modernism in the academy would confine that theorizing within autonomous, localized spheres.

1. *Dashed Hopes Under Clinton*

Clinton took office riding a wave of hope. Disillusioned by the Reagan-Bush I agenda, the Clinton-Gore slogan of "It's the economy, stupid"³²⁷ resonated with voters. Among other promises, he vowed to champion the interests of working people, end the repatriation of Haitian refugees, overhaul the health care system and oppose the temporary replacement of striking workers.³²⁸

But upon assuming office, Clinton pushed harder for the North American Free Trade Agreement (NAFTA)³²⁹ and the 1994 crime bill than for any of the other promises that won him office.³³⁰ NAFTA resulted in the loss of tens of thousands of U.S. jobs.³³¹ The 1994 crime bill expanded the death penalty to 60 federal crimes, targeted immigrants, curtailed *habeas corpus* petitions and laid the groundwork for the more draconian anti-terrorism legislation that would follow the attacks of September 11, 2001.³³² This "New Democrat" and former chair of the conservative Democratic Leadership Council (whose agenda was to break the Democratic Party's identification with organized labor, civil rights and other traditionally liberal causes), adopted many of the fiscal and, at times, social planks of the Republican Party: among them budget balancing, deficit reduction and welfare reform.

Piece by piece, Clinton compromised his signature health care bill and backed the military's homophobic "don't-ask-don't-tell policy," which has resulted in the discharge of hundreds of gays and lesbians

³²⁷ Richard Alleyne, *Gordon Brown: It's the economy, stupid!*, TELEGRAPH (London), May 23, 2008, available at <http://www.telegraph.co.uk/news/newstoppers/byelection/2015038/Gordon-Brown-Its-the-economy-stupid.html>.

³²⁸ See Robert Pear, *The 1992 Campaign: Platform; In a Final Draft; Democrats Reject a Part of Their Past*, N.Y. TIMES, June 26, 1992, available at <http://www.nytimes.com/1992/06/26/us/1992-campaign-platform-final-draft-democrats-reject-part-their-past.html>.

³²⁹ See Pub. L. 103-122, 107 Stat. 2057 (1993).

³³⁰ See Selfa, *supra* note 324, at 7.

³³¹ See Economic Policy Institute, *NAFTA-Related Job Losses Have Piled up since 1993*, Dec. 10, 2003, http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_archive_12102003/.

³³² See Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994); U.S. Department of Justice, *Fact Sheet: Violent Crime Control and Law Enforcement Act*, Oct. 24, 1994, <http://www.ncjrs.gov/txtfiles/billsfs.txt>.

from service.³³³ In 1997, Clinton signed off on a budget agreement that slashed billions from Medicaid and Medicare.³³⁴ He also betrayed organized labor, barely lifting a finger to rescue the “strikers bill of rights” (or “anti-scab bill”) from a Republican filibuster in 1994.³³⁵ The mid-1990s were the time of Newt Gingrich and the extremist “Contract with America,” which proposed a draconian pro-business agenda. Instead of fighting this program, Clinton co-opted key sections of it.³³⁶ He also oversaw the swelling of the prison population, retreated on civil rights and, expanding the military budget, sent U.S. forces to combat a record 46 times, including the 1999 bombing of the former Yugoslavia.³³⁷

For progressive lawyers, perhaps his greatest betrayal was passage of the 1996 welfare reform bill,³³⁸ which his own advisers estimated would result in the impoverishment of more than one million children.³³⁹ “Welfare reform” ended the New Deal’s 61-year-old guarantee of cash assistance for the poorest Americans. Peter Edelman, then a senior official at the Department of Health and Human Services, resigned over passage of the bill, observing: “so many of those who would have shouted their opposition from the rooftops if a Republican president had done this were boxed in by their desire to see the president re-elected and in some cases by their own votes for the bill.”³⁴⁰ Only a sustained (if shallow) economic recovery saved those millions from complete immiseration.³⁴¹

2. *The Politics of Identity*

The activist response to the Clinton agenda showed the worst of identity politics. Identity politics is based on the idea that only those who suffer a particular oppression can define and lead the fight against it; everyone else may play a supporting role, but they are “out-

³³³ See Mark Thompson, ‘Don’t Ask, Don’t Tell’ Turns 15, *TIME*, Jan 28, 2008, available at <http://www.time.com/time/nation/article/0,8599,1707545,00.html>.

³³⁴ See Selfa, *supra* note 324.

³³⁵ S. 55, 103rd Congress (1994); *see id.*

³³⁶ *See id.*

³³⁷ *See id.*

³³⁸ *See* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

³³⁹ *See* Alison Mitchel, *Two Clinton Aides Resign to Protest New Welfare Law*, *N.Y. TIMES*, Sept. 12, 1996, at A1.

³⁴⁰ Peter Edelman, *The Worst Thing Bill Clinton Has Done*, *ATLANTIC MONTHLY*, Mar. 1997, at 43.

³⁴¹ For an excellent discussion of the economic boom during the Clinton years, and how it pales when compared to previous booms in the American economy, see Joel Geier & Ahmed Shawki, *Contradictions of a Miracle Economy*, 2 *INT’L SOCIALIST REV.* 5 (1997), available at http://www.isreview.org/issues/02/miracle_economy.shtml.

siders.”³⁴² Rooted in the fragmentation of the new social movements in the 1970s—which was brought about, in part, by sexism, racism and homophobia among the New Left’s own ranks—identity politics rejects the centrality of class and class struggle, and instead subscribes to the (cross-class) notion that oppressed groups should organize autonomously.

The oppressed have a *right* to do so, of course, that is, to self-determination.³⁴³ And it should go without saying that those who are oppressed should fight their own oppression. But identity politics goes much further. Through the theories of patriarchy, “white-skin privilege,” and heterosexism, it elevates these failings and the understandable responses to them into a pessimistic strategy that holds that those outside particular identity-based “communities” are, by extension, part of the—or even *the*—problem. For example, the LGBT³⁴⁴ group Queer Nation, which was founded in 1990, argued, “It is easier to fight when you know who your enemy is. Straight people are you[r] enemy.”³⁴⁵ In its founding manifesto, distributed during the New York Gay Pride march in 1990, it proclaims: “Go tell [straights to] go away until they have spent a month walking hand in hand in public with someone of the same sex. After they survive that, then you’ll hear what they have to say about queer anger. Otherwise, tell them to shut up and listen.”³⁴⁶

³⁴² See Smith, *supra*, note 201. For a succinct summary of identity politics, see Stanford Encyclopedia of Philosophy, Identity Politics, Nov. 2, 2007, <http://plato.stanford.edu/entries/identity-politics/>.

³⁴³ As Bernice Johnson Reagon, a longtime member of the music group, Sweet Honey in the Rock, has explained, many incipient movements begin with adherents trying to meet in a metaphorical “barred room”—with only those deemed “one of us” admitted at first. But others do inevitably enter (who think or act differently) and community members relatively quickly realize that they will have to venture out of their “barred room” and enter into coalitions if they are to survive and accomplish their goals. See *Coalition Politics: Turning the Century*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 356-68 (Barbara Smith, ed., 1983). I thank Ascanio Piomelli for directing me to her work.

³⁴⁴ Lesbian-gay-bisexual-transgender.

³⁴⁵ The Queer Nation Manifesto (1990), <http://www.digenia.se/andras%20texter/THE%20QUEER%20NATION%20MANIFESTO.htm> (last visited Sept. 17, 2009).

³⁴⁶ *Id.* This sentiment was mirrored in the women’s movement two decades earlier. As activist and writer Rita Mae Brown argued in 1975:

If you can’t find it in yourself to love another woman, and that includes physical love, then how can you truly say you care about women’s liberation . . . Straight women are confused by men, don’t put women first, they betray lesbians and in its deepest form, they betray their own selves. You can’t build a strong movement if your sisters are out there fucking the oppressor.

Smith, *supra* note 201, at 14 (quoting Brown). Ambalavaner Sivanandan observed an analogous phenomenon in the anti-racist organizing at the time: “[T]he enemy of the black is the white as the enemy of the woman is the man. And all whites are racist like all men are sexist.” A. Sivanandan, *All that Melts into Air Is Solid: The Hokum of New Times*, in COMMUNITIES OF RESISTANCE: WRITINGS ON BLACK STRUGGLES FOR SOCIALISM (1990).

At the same time, by personalizing power, Ambalavaner Sivanandan argues in the context of racism, “the fight against racism became reduced to a fight against prejudice, the fight against institutions and practices to a fight against individuals and attitudes.”³⁴⁷

Carried to its logical conclusion, just to be black, for instance, was politics enough: because it was in one’s blackness that one was aggressed, just to be black was to make a statement against such aggression. If, in addition, you ‘came out’ black, by wearing dreadlocks, say, then you could be making several statements Equally, you could make a statement by just being ethnic, against Englishness, for instance; by being gay, against heterosexism; by being a woman, against male domination. Only the white straight male, it would appear, had to go and find his own politics of resistance somewhere out there in the world (as a consumer perhaps?). Everyone else could say: I am, therefore I resist.³⁴⁸

These politics undermined the building of a unified, lasting movement. As Sharon Smith found, “[t]he tendency among groups organized around identity politics has been to grow—sometimes substantially—for a short period of time, and then fairly rapidly to shrink to a much smaller ‘core’ membership.”³⁴⁹ Organizations such as ACT-UP, which spearheaded activism around AIDS policy, and the Women’s Action Coalition in New York, exemplified this trend.³⁵⁰

3. *Postmodern Lawyering*

Progressive lawyering underwent parallel developments in this period. In the more promising political landscape came attempts to challenge the status quo in local rather than regional or national settings. Postmodern and poststructural theorists referred to these as “microsites” of struggle. As Austin Sarat and Stuart Scheingold explain, progressive lawyers often had to choose between defensive work on the one hand and likely futile transformative/organizing efforts on the other:

³⁴⁷ See *id.*

³⁴⁸ *Id.* at 16.

³⁴⁹ Smith, *supra* note 201, at 17-18 (discussing New York chapter of Women’s Action Coalition and Queer Nation).

³⁵⁰ ACT-UP, which stands for “AIDS Coalition to Unleash Power,” is “a diverse, non-partisan group of individuals united in anger and committed to direct action to end the AIDS crisis.” It was founded in 1987. See ACT-UP/New York, <http://www.actupny.org/> (last visited Sept. 17, 2009). The Women’s Action Coalition was founded in 1992, after Clarence Thomas’ confirmation as Supreme Court Justice, and was active until 1995. See New York Public Library, Inventory of the Women’s Action Coalition’s Records, 1992-97, <http://www.nypl.org/research/chss/spe/rbk/faids/wac.html> (last visited Sept. 17, 2009) (describing quick rise to several hundred members attending meetings, dwindling within 3 years to 7-8 members).

A poststructural rethinking of the democratic project . . . afford[ed] some respite from this double bind. Poststructural theories locate domination in cross-cutting social cleavages (race, gender, sexual orientation, age, etc.) and at microsities of power (the family, the workplace, schools, social service agencies and the like). These microsities present less daunting targets for cause lawyers, who in effect turn away from high-impact, class action litigation and/or frontal assault on the institutions of the state. They focus instead on the empowerment of individual, or perhaps small groups of, clients. With less at stake politically and more at stake legally, legal institutions may well come closer to living up to their professed ideals.³⁵¹

In this period, the ideological focus of the 1980s translated into more practical projects. Fueled by local, community organizing efforts and influenced by postmodern, identity-based social theory,³⁵² the liberal professionalism that took hold in the 1970s and the progressive theoretical gaze that turned inward the decade thereafter flowered into a set of approaches that addressed the limits of litigation;³⁵³ dynamics of legislative advocacy;³⁵⁴ educational³⁵⁵ and organizing campaigns;³⁵⁶ use of the media;³⁵⁷ collaboration with other professionals (and other multidisciplinary approaches);³⁵⁸ the optimal delivery of legal services to the indigent;³⁵⁹ community economic development;³⁶⁰

³⁵¹ Sarat & Scheingold, *supra* note 27, at 9 (citations omitted).

³⁵² For a succinct review of postmodernism in the legal academy, see Joel Handler, *The Presidential Address, 1992: Postmodernism, Protest and the New Social Movements*, 26 LAW & SOC'Y REV. 4 (1992). *But see* Piomelli, *supra*, note 44, at 445 et seq. (critiquing Handler's—and others'—critique of López, White and Alfieri); Piomelli, *supra* note 9 (arguing that collaborative lawyering is influenced primarily by democratic theory—in particular by Ella Baker and John Dewey—rather than postmodernism) & *id.* at n.17 (summarizing postmodernist thought). For a Marxist argument against postmodernism, see ALEX CALINICOS, *AGAINST POSTMODERNISM: A MARXIST CRITIQUE* (1989).

³⁵³ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

³⁵⁴ See Stoddard, *supra*, note 116.

³⁵⁵ See Loffredo, *supra* note 260; Eagly, *supra* note 117.

³⁵⁶ See, e.g., Hina Shah, *Attorneys as Organizers*, 6 ASIAN L. J. 217 (1999).

³⁵⁷ See Anna Maria Marshall, *Social Movement Strategies & the Participatory Potential of Litigation*, in *CAUSE LAWYERING III*, *supra* note 1, at 172-73; Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to be Competent in Public Advocacy*, 30 *HAMLIN L. REV.* 567 (2007).

³⁵⁸ See, e.g., Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123 (1999); Leigh Goodmark, *Can Poverty Lawyers Play Well With Others? Including Legal Services in Integrated, School-Based Service Delivery Programs*, 4 *GEO. J. ON FIGHTING POVERTY* 243 (1997); Randy Retkin, Gary L. Stein & Barbara Hermie Draimin, *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 *FORDHAM URB. L. J.* 533 (1997).

³⁵⁹ See, e.g., Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 *FORDHAM L. REV.* 2339 (1999).

and client relations—among a variety of other investigations.

Scholars arrayed these approaches as alternatives to traditional public interest lawyering, which, some scholars argued, had privileged litigation over all other legal tools.³⁶¹ Many shared the critique of public interest law practice as being in an “identity crisis.”³⁶² But the critique went much farther. Scholars actually blamed “older models of lawyering [for not] bringing about promised change.”³⁶³ Indeed, some scholars blamed lawyering itself. The very act of representing the client, argued Alfieri (and in at least one instance, White) does “violence” to the client, and “falsifies” her story.³⁶⁴ The implication is that a particular *professional* approach—or in López’s case, deprofessionalized relationship—would solve the problem. Either way, lawyering—either itself or as typically practiced by liberal-legalist public interest lawyers—was the problem. Ironically, this was public interest lawyering’s professional focus extended to organizing clients. Thus, with the client reclaiming center stage, the various approaches eschewed isolated litigation (or minimized it as an option),³⁶⁵ urged “dialogue,” and considered how traditional action could “complement and encourage—not replace—community activism and political involvement.”³⁶⁶

López’s 1992 book, *Rebellious Lawyering*, was perhaps the most influential work to offer a systematic approach in this regard. Criticizing what he termed “regnant” lawyering, he argued for a vision of “teaching self-help and lay lawyering” and of “co-eminent” practitioners of lawyers and clients.³⁶⁷ The “rebellious lawyer,” López argued,

must know how to work with (not just on behalf of) women, low-income people, people of color, gays and lesbians, the disabled, and the elderly. They must know how to collaborate with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation. They must understand how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come in contact, particularly about the traditions and exper-

³⁶⁰ See, e.g., Shah, *supra* note 65.

³⁶¹ See Buchanan & Trubek, *supra* note 5, at 688-89.

³⁶² See Esquivel, *supra* note 176.

³⁶³ See Buchanan & Trubek, *supra* note 5, at 688.

³⁶⁴ See Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2111 (1991).

³⁶⁵ See *supra* notes 89-90 and accompanying text.

³⁶⁶ See Johnson, *supra* note 265, at 205.

³⁶⁷ LÓPEZ, *supra* note 8, at 70. As discussed in Section II.A, *supra* notes 122-73 and accompanying text, earlier writers prefigured this advice. See, e.g., Ginger, *supra* note 2, at 15 (lawyers should “help in the development of organizations of lay counselors”).

iences of life on the bottom and at the margins.³⁶⁸

López argued that rebellious lawyers must ground themselves in the communities and lives of the subordinated, continually evaluate legal and nonlegal approaches, know how to strategize, build coalitions—and

appreciate how all that they do with others requires attention not only to international, national, and regional matters but also to their interplay with seemingly more mundane local affairs. At bottom, the rebellious idea of lawyering demands that lawyers (and those with whom they work) nurture sensibilities and skills compatible with a collective fight for social change.³⁶⁹

As Angelo Ancheta summarized in his review essay of López's book:

Lopez's rebellious lawyers . . . are deeply rooted in the communities in which they live and work. They collaborate with other service agencies and with the clients themselves; they try to educate members of the community about their rights; they explore the possibilities of change and continually reexamine their own work in order to help their clients best. Rebellious lawyering thus redefines the lawyer-client relationship as a cooperative partnership in which knowledge and power are shared, rejecting a relationship limited to an active professional working on behalf of the passive, relatively powerless layperson.³⁷⁰

López anchored his theory on a narrative-based understanding of persuasive problem-solving. The use of narrative and story-telling became a dominant feature of postmodern scholarship in the 1990s. Eschewing structuralism and "meta-theory,"³⁷¹ some proponents—though not López—even argued that the very act of telling marginalized and silenced stories would destabilize existing institutional arrangements. Persuasion was key. As López himself explained:

We see and understand the world through "stock stories." These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social and political values. At the same time, they help us carry out the routine activities of life without constantly having to analyze or question what we are doing To solve a problem through persuasion of another, we therefore must understand and

³⁶⁸ LÓPEZ, *supra* note 8, at 37.

³⁶⁹ *Id.* at 38.

³⁷⁰ Ancheta, *supra* note 41, at 1370.

³⁷¹ Ian McEwan describes the sentiment in passing in one of his novels: "After the ruinous experiments of the lately deceased century, after so much vile behavior, so many deaths, a queasy agnosticism has settled around these matters of justice and redistributed wealth. No more big ideas. The world must improve, if at all, by tiny steps." IAN MCEWAN, SATURDAY 74 (2005).

manipulate the stock stories the other person uses in order to tell a plausible and compelling story – one that moves that person to grant the remedy we want.³⁷²

López's approach was very influential. Indeed, his approach crystallized the progressive critique of liberal public interest law practice as undermining, rather than furthering, client activism. Many activist lawyers now self-consciously aspire to practice "rebelliously."³⁷³

But López's prescriptions had a number of weaknesses. For one, even as he called for an appreciation of the larger context, he called for theory that is useful only for "specific purposes" that would last only for "a reasonable period of time."³⁷⁴ For López, grand narratives were suspect.³⁷⁵ His larger project emanated simply from the lawyer-client collaboration and "as an instrument of practical problem-solving and daily living."³⁷⁶ In place of systematic analysis, then, we are left with impressionism. A related weakness was that López demurred on articulating an alternative normative vision.³⁷⁷

No sooner had López's ideological influence spread than did it come under criticism. "[T]he defects in poverty lawyering," Paul Tremblay argued, "are structural, institutional, political, economic, and ethical."³⁷⁸ Similarly, Ancheta criticized López's focus on the "microdynamics of lawyering."³⁷⁹ The key questions, he argued, are "how much more effective is rebellious lawyering than regnant lawyering in achieving social change?"³⁸⁰ and "[c]an rebellious lawyering help bring about the shifts in *institutional* power that are also necessary to construct a social reality that alleviates subordination?"³⁸¹ In another critique, Southworth argued that López was "taking the law-

³⁷² Gerald P. López, *Lay Lawyering*, 32 U.C.L.A. L. REV. 1, 3 (1984).

³⁷³ See, e.g., Hing, *supra* note 117; Yale Law School's annual "Rebellious Lawyering" conference, <http://islandia.law.yale.edu/reblaw/> (last visited Apr. 30, 2009).

³⁷⁴ LÓPEZ, *supra* note 8, at 66.

³⁷⁵ See *id.* (rebellious lawyers "don't expect (and in fact are suspicious of) too long a reign for any particular formulation of what they and others experience").

³⁷⁶ See *id.*

³⁷⁷ See, e.g., Milner S. Ball, *Power From the People*, 92 MICH. L. REV. 1725, 1735-36 (1994). But see Piomelli, *supra* note 44, at 477-85 (arguing that López's vision is implicit in his depiction of "regnant" and "rebellious" actors in his book); see also Piomelli, *supra* note 9.

³⁷⁸ Tremblay, *supra* note 87, at 950; see also Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1089 (1994) ("implicit suggestion" of postmodern lawyering scholarship "is that the main problem faced by the poor and subordinated people is not unemployment, illness, hunger, homelessness, degradation, or racist oppression, but rather the 'interpretive violence' done to their narratives by poverty lawyers").

³⁷⁹ See Ancheta, *supra* note 41, at 1388.

³⁸⁰ *Id.* at 1375.

³⁸¹ *Id.* at 1388.

yer out of progressive lawyering.”³⁸² López’s prescription, she argued, offered “an excessively pessimistic assessment of the range and value of the skills that lawyers can provide.”³⁸³ In her estimation, “[h]is alternative vision of lawyering imagines a relatively minor role for lawyers’ specialized knowledge and skills.”³⁸⁴

Others leveled more scathing critiques of postmodernism generally. In his 1992 presidential address to the Law and Society Association, for example, Joel Handler questioned the political value of postmodernism *writ large*.³⁸⁵ Comparing them to the scholars of the 1960s and ‘70s who spoke of solidarity and struggle—“collective identity and collective strength”—postmodernist scholars, he argued, were pessimistic and isolated.³⁸⁶

Simon summed up the situation succinctly in 1994:

The new poverty lawyers write at a time when practitioners feel besieged by hostile politicians and rebuffed by the judiciary, and the idea that lawyering might serve ambitious goals seems less plausible than ever.

Thus, we find ourselves in the peculiar situation of having for the first time an extensive and rich literature on poverty law – a literature that makes substantial progress toward the goal of bringing theory to bear on practice – at a time when the general state of poverty law practice is so depressing.³⁸⁷

As a result, the focus of much progressive lawyering theory in this period became, in Sameer Ashar’s words, “therapeutics.”³⁸⁸ As Simon elaborated in an earlier essay, in this paradigm,

power is obscured by psychologism, the reduction of the social to the personal . . . It resists understanding power as a product of class, property, or institutions and collapses power into the personal needs and dispositions of the individuals who command and obey. From this perspective, it becomes difficult to distinguish the powerful from the powerless. In every case, both the exercise of power and submission to it are portrayed as a matter of personal accommodation and adjustment.³⁸⁹

Ashar has observed how this paradigm coincided with the clinical field’s focus on client-centered representation, eclipsing even further

³⁸² See Southworth, *supra* note 88.

³⁸³ *Id.* at 215.

³⁸⁴ *Id.*

³⁸⁵ See Handler, *supra* note 352.

³⁸⁶ *Id.*

³⁸⁷ William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1100 (1994).

³⁸⁸ See Ashar, *supra* note 1, at 380-383.

³⁸⁹ Simon, *supra*, note 29, at 495.

the progressive bar's consideration of larger social context.³⁹⁰

Nonetheless, this tradition—in particular its specific variant in the “law and organizing” literature³⁹¹—reclaimed client, or popular, activism as central to the progressive lawyering project. Even though there is more continuity between the aspirations of movement lawyers of the 1960s and “law and organizing” practitioners of today than sometimes has been acknowledged, “law and organizing has fundamentally altered the terrain of progressive legal practice. By highlighting the value of organizing . . . proponents have reclaimed the centrality of community members in shaping social change.”³⁹²

E. ‘Revolution’ Redux?: Reascendant Left-Liberalism and Law and Organizing Lawyering in the Millenium

In reclaiming the centrality of client activism, the most recent wave of scholarship appears to have shifted theoretical focus once again. In the new millennium, scholarly preoccupation with the internal dynamics of the lawyer-client relationship has given way to renewed emphasis on external, structural issues of activist strategy and political economy. Since the turn of the century, scholars, among other issues, have rehearsed the structural causes of poverty, wealth, racism, materialism and militarism,³⁹³ urged practitioners to take “macro historical factors” into account,³⁹⁴ examined the political foundations of progressive lawyering theory,³⁹⁵ interrogated the meaning of “organizing,”³⁹⁶ exhorted lawyers to “pass through the door” of social movement theory,³⁹⁷ and even *led* organizing campaigns³⁹⁸—a prescription that would have been considered heresy only years ago. This outward turn, I would argue, is not coincidental, as it occurs amidst heightened popular activism and a reascendant left-liberalism. As in the preceding subsections, I sketch in this subsection what I believe to be the central dynamic animating client activism and progressive lawyering theory in the current period.

³⁹⁰ See Ashar, *supra* note 1, at 387 (criticizing client-centered approach as “inculcat[ing] a narrow vision of professional role amongst law students”) (citation omitted).

³⁹¹ See *supra* note 4

³⁹² Cummings & Eagly, *supra* note 4, at 479.

³⁹³ See Quigley, *supra* note 17.

³⁹⁴ See McCann & Dudas, *supra* note 11

³⁹⁵ See Piomelli, *supra* note 9.

³⁹⁶ See Cummings & Eagly, *supra* note 4.

³⁹⁷ See Rubin, *supra* note 13; see also Price & Davis, *supra* note 4.

³⁹⁸ See Narro, *supra* note 13.

1. *Mass Activism, September 11, the Obama Presidency and Economic Crisis*

It would be foolish, of course, to talk about the first decade of the millennium as a monolithic historical period. The terrorist attacks of September 11, 2001, and the gravity of the Bush II Administration's response to them;³⁹⁹ the improbable election of Barack Obama as the first African-American U.S. president; and the worldwide economic crisis are only three of many world-altering events this decade. Nonetheless, there is one discernable trend: greater popular activism animated by reascendant left-liberal politics. This was evident even before the turn of the century, when tens of thousands of "anti-globalization" protesters shut down the ministerial meeting of the World Trade Organization in Seattle in November 1999. The "Battle of Seattle"⁴⁰⁰ and its aftermath—including mass demonstrations against both the Democratic and Republican National Conventions in Los Angeles and Philadelphia in 2000,⁴⁰¹ and the Group of Eight summit in Genoa in 2001—featured an unprecedented alliance between organized labor and environmental activists—"Teamsters and Turtles"—some formations of whom allied with the insurgent campaign of Green Party presidential candidate Ralph Nader. The subsequent demonstrations against the wars in Afghanistan and Iraq mobilized millions.⁴⁰² Indeed, the depth of anti-war sentiment propelled Howard Dean's presidential candidacy in 2004 and arguably catapulted Barack Obama to the presidency in 2008. Many see Obama's election as the end of the

³⁹⁹ The heinousness of the Bush II Administration's conduct includes: stealing an election, deploying and justifying torture, mounting a systematic assault on privacy and civil liberties, and fabricating evidence for and waging pre-emptive war.

⁴⁰⁰ See ALEXANDER COCKBURN, JEFFREY ST. CLAIR & ALLAN SEKULA, *5 DAYS THAT SHOOK THE WORLD: SEATTLE AND BEYOND* (2000).

⁴⁰¹ See, e.g., Juan Gonzalez, *From Seattle to South Central: What the Movement Needs to Do Next*, IN THESE TIMES, Sept. 18, 2000, available at <http://www.inthesetimes.com/issue/24/21/gonzalez2421.html>; *Mass Protest at Democratic Convention*, SOCIALIST WORKER (UK), Aug. 19, 2000; CNN.com Allpolitics, *Ten Arrested in Protests at Democratic Convention*, Aug. 14, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/08/14/campaign.protest.02/index.html>; World Socialist Web Site, Jerry White, *Los Angeles Police Attack Protesters at Democratic Convention*, Aug. 17, 2000, <http://www.wsws.org/articles/2000/aug2000/la-a17.shtml>.

⁴⁰² See, e.g., BBC News, *"Million" March against Iraq War*, Feb. 16, 2003, <http://news.bbc.co.uk/1/hi/uk/2765041.stm>; Alan Cowell, *Threats and Responses: Protests; 1.5 Million Demonstrators in Cities Across Europe Oppose a War against Iraq*, N.Y. TIMES, Feb. 16, 2003, available at <http://www.nytimes.com/2003/02/16/world/threats-responses-protests-1.5-million-demonstrators-cities-across-europe-oppose.html?sec=&spon=&emc=eta1>. One publication reports the following numbers of anti-war protesters: October 26, 2002: 150,000 in Washington, 75,000 in San Francisco and "tens of thousands" in other cities; Oct. 6, 2002, 25,000 in Central Park, New York. *The Antiwar Movement: A Great Beginning*, 26 INT'L SOCIALIST REV. 2 (2002).

neo-conservative era that defined U.S. society the past 30 years.⁴⁰³ As Hendrik Hertzberg observed of the Obama victory: “Empathically, comprehensively, the public has turned against conservatism at home and neoconservatism abroad. The faith that unfettered markets and minimal taxes on the rich will solve every domestic problem, and that unilateral arrogance and American arms will solve every foreign one, is dead for a generation or more.”⁴⁰⁴

On the civil rights front, activism has also surged around gay marriage and immigrant rights issues.⁴⁰⁵ The gravity of the current economic crisis—not to mention climate change—has forced a reconsideration of grand narratives.

2. *Revolutionary Lawyering?*

In progressive lawyering theory, there appear to be analogous developments as well. In the millennium, the new appellation “law and organizing” suggested more promising activist prospects.⁴⁰⁶ Similarly, Edward Rubin called for the application of social movement theory to lawyering practice.⁴⁰⁷ More recently, Piomelli sought to make more explicit the political bases of critical lawyering theory.⁴⁰⁸

“Revolution” has also reentered the lexicon.⁴⁰⁹ Bill Quigley—now legal director for the Center for Constitutional Rights—has called for “revolutionary lawyering” in a recent article.⁴¹⁰ Although he tempers his call by counterposing a vision of “restrained capitalism,” Quigley argues:

We need revolutionaries . . . Revolutionaries are called not just to test the limits of the current legal system or to reform the current

⁴⁰³ See, e.g., George Packer, *The Fall of Conservatism*, THE NEW YORKER, May 26, 2008, available at http://www.newyorker.com/reporting/2008/05/26/080526fa_fact_packer; Lance Selfa, *End of the Reagan-Bush Era?*, SOCIALIST WORKER, Feb. 8, 2008, http://www.socialistworker.org/2008-1/661/661_07_Era.shtml; Lance Selfa, *Election 2008: Beginning of a New Era?*, 58 INT’L SOCIALIST REV., Mar.-Apr. 2008, at <http://www.isreview.org/issues/58/feat-elections.shtml>; Benjamin Wallace-Wells, *The End of Republican America?*, N.Y. TIMES MAG., Mar. 30, 2008, at 44.

⁴⁰⁴ See Hendrick Hertzberg, *Obama Wins*, THE NEW YORKER, Nov. 17, 2008, at 39-40.

⁴⁰⁵ See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007); Jesse McKinley, *Across U.S., Big Rallies for Same-Sex Marriage*, Nov. 16, 2008, available at http://www.nytimes.com/2008/11/16/us/16protest.html?_r=1&emc=eta1.

⁴⁰⁶ See Cummings & Eagly, *supra* note 4; Price & Davis, *supra* note 4.

⁴⁰⁷ See Rubin, *supra* note 13.

⁴⁰⁸ See Piomelli, *supra* note 9; see also Ascanio Piomelli, *Foucault’s Approach to Power: Its Allure & Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395 (2004).

⁴⁰⁹ See Quigley, *supra* note 17; Panel Discussion, *Rights, Religion, Revolution: Theories of Advocacy for the Poor*, Annual Meeting Program, Association of American Law Schools, “Reassessing our Roles as Scholars and Educators in Light of Change,” Jan. 2-6, 2008, at 76.

⁴¹⁰ See Quigley, *supra* note 17.

law, but also to join in the destruction of unjust structures and systems and to tear them up by their roots. We are called to replace them with new systems based on fairness and justice.⁴¹¹

Echoing Quigley's argument, a 2008 AALS conference discussed revolution as a theory of advocacy.⁴¹²

In a sense, we have come full circle: from the revolutionary project of the movement lawyers of the 1960s to the nascent radical if not revolutionary project of social justice and "law and organizing" lawyers of the millennium. Along the way, public interest lawyering popularized activist lawyering (and, indeed, won the institutional "access" it had sought), critical lawyering gave voice to a neglected ideological dimension and to aspects of social alienation in the period of political reaction, and postmodern lawyering crystallized a reorientation to the lawyer-client relationship and reclaimed the centrality of clients' grassroots efforts in the process of social change. What's next? In the following section, I return to the three themes that, I argue, have been underdeveloped in the theoretical literature—the definition of fundamental social change, analyses of social context and use of various activist methods—and raise fundamental questions that require further study.

III. CLIENT ACTIVISM: AIMS, CONTEXTS AND METHODS

As I hope I have demonstrated in Part II, ultimate political aims, societal analyses and activist strategies define progressive lawyering theory more than the claimed superiority of any one style of practice. Indeed, from the early (and more recent) articulation of radical social visions to the enduring commitment to client empowerment and self-determination, progressive legal practice has exhibited steady continuity when disaggregated along these three axes. In this Part, I discuss the extent to which progressive lawyering scholars have addressed these three questions and offer baseline considerations for analyzing them. These three fundamentals may be thought of as constituting what some scholars refer to as "theories of social change," and they remain under-theorized in progressive lawyering scholarship. Simply put, as progressive lawyers, we need to deepen our grounding in three overarching political questions: what is happening now, where we are going, and how we are going to get from here to there. This project is particularly imperative given a new era that many believe heralds major shifts and opportunities in the American and international economic and political landscape, redefining even the very way

⁴¹¹ *Id.* at 105-07.

⁴¹² See Panel Discussion, *supra* note 409.

we think of the future of the planet.

A. *'Fundamental Social Change': Articulating Alternative Normative Visions*

One one level, progressive legal work is necessarily about reform—the enforcement of workplace safety laws, for example, or defeat of anti-immigrant legislation. At the same time, it is also about social alternatives. Underlying—and beyond—individual cases and advocacy campaigns are, as some recent initiatives put it, notions of “substantive justice.”⁴¹³ “[A]bsent an affirmative political and social vision,” observes Ashar, “even self-conscious practitioners reproduce the status quo.”⁴¹⁴ We need to be clear about what we’re fighting *for* as much as what we’re fighting against.

In progressive lawyering scholarship, these alternative normative visions are either exclusively process-oriented⁴¹⁵ or euphemistically or rhetorically articulated, and, in both instances, infrequently elaborated.⁴¹⁶ The common use of the term “fundamental social change” exemplifies this tendency.⁴¹⁷ What exactly does fundamental social change mean? The vagueness and tentativeness with which lawyering scholars have answered this question is, of course, understandable. It is *the* question—and enormously difficult to answer. Moreover, for lawyers committed to change from below, meaningful alternatives can only arise from creative, participatory, collective struggle. Finally, beyond these hesitations, it can mean many things, depending upon

⁴¹³ See University of Denver Sturm College of Law, *Conceptualizing Substantive Justice*, Apr. 18, 2009, <http://www.law.du.edu/index.php/conceptualizing-substantive-justice>; Global Alliance for Justice Education, *Justice Education in a Community Context*, Dec. 7-13, 2008, <http://law.gsu.edu/gaje/index/conference> (5th Worldwide Conference of the Global Alliance for Justice Education).

⁴¹⁴ Ashar, *supra* note 1, at 389 (paraphrasing Bellow).

⁴¹⁵ See, e.g., Gordon, *supra* note 8, at 430 (“end goal” as “organizing immigrant workers”).

⁴¹⁶ I count myself as among those who have done so. See Eduardo R.C. Capulong, *Which Side Are You On? Unionization in Social Service Nonprofits*, 9 N.Y.C. L. Rev. 373, 402-404 (2006) (mentioning, but not elaborating on, goal of “fundamental social change”); see also Barbara Ehrenreich & Bill Fletcher, Jr., *Reimagining Socialism*, THE NATION, Mar. 23, 2009, at 14 et seq. (admitting they don’t have “plan” and “don’t even have a plan for the deliberative process that we know has to replace the anarchic madness of capitalism”); but see Bachmann, *supra* note 15, at 3 (explaining his vision as “‘communitarian,’ ‘social democratic,’ ‘democratic socialist,’ or ‘populist’” and characterized by “(1) a respect for personhood (‘individuality’); (2) an appreciation of community; (3) a commitment to democracy (social, economic, and political); (4) realizability”) (internal citations omitted).

⁴¹⁷ See, e.g., César Cuauhtémoc García Hernández, *Radical Environmentalism: The New Civil Disobedience?*, 6 SEATTLE J. FOR SOC. JUST. 289, 299 (2007); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1606 (1989); Emma F. Phillips, “*Maybe Tomorrow I’ll Turn Capitalist: Cuentapropismo in a Workers’ State*,” 41 LAW & SOC’Y REV. 305, 306 (2007).

whom you ask. For example, the movement lawyers of the 1960s sought equality and an “end to poverty.” Many rejected capitalism and liberal democracy altogether and sought a radical democratic or socialist future.⁴¹⁸ For them, the problem was both “the System,” i.e., capitalism, and “the Establishment,” i.e., the liberal-democratic state. The succeeding generation of liberal public interest lawyers, by contrast, sought to rehabilitate the very “System” their predecessors rebelled against. For them, the problem lay not in capitalism itself, but in its corruption; “the System” was basically sound, so long as it allowed them to participate in it. Indeed, as Hilbink astutely observed, these lawyers “were the establishment.”⁴¹⁹ Later, as progressive lawyers’ aspirations failed to come to fruition, the next generation of community and rebellious lawyers chose to rearticulate a normative vision that, they insisted, could not be foreordained.⁴²⁰ Equating Marxism and socialism with the Soviet Union, for example, White argued that the Soviet collapse marked “the demise of socialism as a plausible way to organize a complex society.”⁴²¹ In the 1980s and ‘90s, many scholars rejected a structuralist analysis and refocused change on what skeptics called the “microdynamics of lawyering,”⁴²² arguing for “problem-solving,”⁴²³ “community building”⁴²⁴ and “building power”⁴²⁵ in the belief that only through such efforts could new and genuine affirmative political and social visions organically develop.

However elaborated, the main fault line in the quest to articulate such alternative normative visions centers on the age-old debate between reform—more accurately reformism—and revolution. The necessary choice is between incremental change within the prevailing social and economic order—i.e., reforming capitalism and liberal democracy—and a dynamic conception of social change beyond it—i.e., a post-capitalist, revolutionary alternative.⁴²⁶ Should client activism

⁴¹⁸ See JAMES, *supra* note 122; LAW AGAINST THE PEOPLE, *supra* note 148.

⁴¹⁹ See Hilbink Dissertation, *supra* note 29, at 342 (emphasis in original).

⁴²⁰ See Ashar, *supra* note 1, at 358-59, 361; Peter H. Shuck, *Public Law Litigation & Soc'l Reform*, 102 YALE L.J. 1763, 1767 (1993) (criticizing López's failure to elaborate what “constitutes and causes social change” as “an astonishing omission”).

⁴²¹ See White, *supra* note 7, at 827.

⁴²² See Ancheta, *supra* note 41, at 1390.

⁴²³ See LÓPEZ, *supra* note 8.

⁴²⁴ See Cummings & Eagly, *supra* note 4, at 460 (noting goal of community organizing is community building).

⁴²⁵ See Ashar, *supra* note 1, at 406.

⁴²⁶ See, e.g., LUXEMBURG, *supra* note 17, for a classic statement of the difference between these two goals; Hilbink, *Categories of Cause Lawyering*, *supra* note 1 (comparing visions of “the System,” “the Cause,” and lawyer’s role of “proceduralist,” “elite/vanguard” and “grassroots” lawyers); see also Ashar, *supra* note 1, at 409 (citing James Bohman and Habermas’s “vision of radical democracy[as] marked by a commitment to long-term incremental change rather than outmoded stories of revolutionary social

simply reform existing institutional structures and social relations within the present system? Or should it strive to completely replace the system itself? Even though reformists and revolutionaries often travel the same path, they ultimately do not have the same goals. Progressive lawyering devoted to one or the other project therefore has differing imperatives; we need to be clear about our orientations. This is especially true today as legal liberalism and radicalism, both recognizing crisis and opportunity and claiming the mantle of “progressive,” retool their strategies. Orienting to the political moment, for example, liberal thinkers have articulated the incrementalist strategy of “democratic constitutionalism,” in which courts would “pursue many of the same social-justice ends that the Warren Court sought to advance, only using more modest, less uniformly activist means—always acting in conjunction with progressive political movements.”⁴²⁷ Similarly, radicals have begun to more openly interrogate what “socialism” means.⁴²⁸ Both projects are anchored in mass activism—but to what end?

1. Reformism

There are, of course, compelling reasons to hold on to existing institutional arrangements and pursue change from within. First of all, lawyers are, by definition, ethically bound to work within the law and legal system. Secondly, because law is relatively autonomous from politics, the legal system has been and can be receptive to progressive, indeed sweeping, social change—albeit only when challenged and threatened sufficiently.⁴²⁹ Despite many shortcomings, it is undeniable that capitalism and liberal democracy provide real economic, political, social and cultural benefits, and seem inexhaustibly capable of adapting and surviving deep crises—albeit “at the expense of the majority it exploits”⁴³⁰. Compared to these gains, the revolutionary experiences of, say, the former Soviet Union, China, Cuba and other “socialist” countries offer questionable alternatives at best. Given such historical experiences, it is understandable to think that revolutionary transformation is utopian. If it is, then of course we should accept working within the system—reformism—as the only meaningful strategy for social change.

transformation”).

⁴²⁷ See, e.g., Jeffrey Rosen, *What's a Liberal Justice Now?*, N.Y. TIMES MAG., May 31, 2009, at 52.

⁴²⁸ See, e.g., Ehrenreich & Fletcher, *supra* note 416.

⁴²⁹ See, e.g., *supra* note 109 (describing reforms of the 1960s).

⁴³⁰ See Tariq Ali, *Capitalism's Deadly Logic*, THE NATION, Mar. 4, 2009, <http://www.thenation.com/doc/20090323/ali>.

2. *Revolution*

Yet despite its risks, the case for a revolutionary, post-capitalist alternative is just as—and, in fact, can be more—compelling, because reforms are clearly not enough. Reformism is a Sisyphean task in a market economy. One need only look at the reversal of gains of the social movements of the 1960s and early '70s, or even the 1930s, to at least *see* the argument for revolution. That is, if we do not alter the structural bases for poverty, war, racism, sexism, homophobia and other social ills, we forever will be consigned to fighting them.

Capitalism, argues Bertell Ollman, produces values wholly incompatible with those required to overcome these inequities. In discussing a revolutionary socialist alternative, Ollman observes that our daily, “live[d]” experience in a market economy “leads to certain ideas about oneself, money, products, social relations, and the nature of the society[,] which have to do with individualism, freedom to choose, the power of money, greed, competition, and mutual indifference”⁴³¹ These ideas, he continues, “as well as [] their accompanying emotions are the exact opposite of those—like cooperation, solidarity, and mutual concern—that are required by life in socialism, that is, if such a society is to work.”⁴³² Ollman argues:

[M]ost people . . . think of the market as a tool. Tools generally function as they do because of who is holding them and how he or she chooses to use them. Basing themselves on this metaphor, many on the left think of the market as a kind of can opener. It's in our hands and we can use it to open cans if we want. However, if we change the metaphor from can opener to meat grinder and instead of seeing ourselves holding it we view ourselves as being inside it, all of a sudden the market appears to be doing something quite different. Rather than moving in ways we direct, it is us that gets moved about according to its rhythm, and it will eventually turn us into ground meat. This is a really the best metaphor with which to think of the market. The market is not an instrument in our hands like a can opener. It's more like a meat grinder and we're inside it.⁴³³

⁴³¹ Political Affairs Magazine, Joel Wendland, *Marx, Markets and Meatgrinders: An Interview with Bertell Ollman*, <http://www.politicalaffairs.net/article/articleview/108/1/28/> (last visited Sept. 14, 2009).

⁴³² *Id.*

⁴³³ *Id.* In the words of Bill Quigley:

We have been taught to believe that radical change is impossible, or at least very, very dangerous. People exploring the possibility for serious change must constantly contend with false messages: “This is the best we can do;” “We live in the most generous and best nation in the history of the world;” “Unrestrained capitalism is the ultimate and only way of solving all our problems;” “Our problems are too big for anyone to handle;” “Go slowly;” “Just look out for number one;” “Do not be a radical;” “Do not be a revolutionary;” and most importantly, “Be afraid, be very afraid, of terrorists, illegal immigrants, black men, pushy women, of people who are trying

Notwithstanding its nature, continues Ollman:

It doesn't follow that we should try to abolish the market over night. I think we should make serious inroads on the market as soon as we have the chance to do so, expanding public ownership and creating a democratic central plan for producing and distributing our most important goods. That wouldn't include everything. It is terribly important, however, that we keep clearly in mind the ultimate goal of doing away with private ownership and market exchanges completely, that public education for it – particularly as the crucial step in overcoming alienation – never falters, and that the pace toward attaining this goal remains steady.⁴³⁴

Despite this difference between reformist and revolutionary social change strategies, there is a dynamic between them. “[I]t is in the collective fight for reforms,” observes Paul D’Amato, “that ordinary people are radicalized and are infused with class consciousness and a sense of their own power [A] mass struggle can, under the right circumstances, pass over into an insurrectionary struggle that challenges for power.”⁴³⁵ Nonetheless, the revolutionary alternative is not simply an accumulation of reforms. In a debate with fellow German Social Democratic Party leader, Eduard Bernstein, the Polish socialist Rosa Luxemburg argued:

It is contrary to history to represent work for reforms as a long drawn-out revolution, and revolution as a condensed series of reforms. A social transformation and a legislative reform do not differ according to their duration, but according to their content. The secret of historic change through the utilization of political power resides precisely in the transformation of simple quantitative modification into a new quality—or to speak more concretely, in the passage of an historic period from one given form of society to another.

That is why people who pronounce themselves in favor of the method of legislative reform *in place of and in contradistinction to* the conquest of political power and social revolution, do not really choose a more tranquil, calmer and slower road to the *same* goal, but a *different* goal. Instead of taking a stand for the establishment of a new society, they take a stand for surface modifications of the old society.⁴³⁶

For those espousing revolutionary change, however, the main chal-

to take advantage of us, of international cooperation, of accountability, and most of all, of big change.”

Quigley, *supra* note 17, at 115-16.

⁴³⁴ Wendland, *supra* note 431.

⁴³⁵ See Paul D’Amato, *Reform Struggles and the Road to Revolution*, Feb. 15, 2008, <http://socialistworker.org/2008/02/15/reform-revolution>.

⁴³⁶ LUXEMBURG, *supra* note 17, at 74-75.

lence is reckoning with past attempts at such efforts.

B. Analyzing a Dynamic Social Context and Attuning a Political Perspective

Regardless of our political orientations, we operate under the same dynamic circumstances. Buchanan captures this fluid context:

Social change lawyering is not static; it changes over time. Whether certain lawyering practices are enabling or disempowering, or whether they transform or reinforce the status quo, are not questions that can be discussed meaningfully without reference to a complex web of social, political, and cultural norms that situate and give meaning to a set of practices in a particular place and time.⁴³⁷

Hence, “adherence to theory of any sort, even critical theory, will not stand the progressive lawyer in good stead unless she also develops a sensitivity to the political context in which we act on and test those theories.”⁴³⁸ Unfortunately, as Gordon observes, progressive lawyering literature fails “to answer the larger question of how social change occurs.”⁴³⁹

Karl Marx observed that political consciousness—which he termed “subjective”—is the product of social conditions—which he termed “objective.”⁴⁴⁰ When translated into action, consciousness in turn can change those conditions. Therein lies the dialectic among consciousness, action and social conditions. Consciousness may turn into action—or it may not. When it does, such action can take forms that are either organized (as in strikes) or unorganized (as in rioting).⁴⁴¹ For political activists and their lawyers, therefore, the question

⁴³⁷ Buchanan, *supra* note 1, at 1003; *see also* Nan Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1012 (1997) (“Breakthrough moments in law occur rarely but not randomly, regardless of arena. They usually follow long periods of incremental, often nearly imperceptible, social change occurring at a glacial pace. When they do occur, they crystallize what has gone before at the same instant that they propel social structures forward.”); McCann & Dudas, *supra* note 11, at 37-38 (“potential contributions of cause lawyers to movement activity everywhere are variously enhanced or constrained by key features of the historical context”).

⁴³⁸ *See* Hoffman, *supra* note 303, at 285; *see also* Bellow, *supra* note 8, at 306 (“The process of linking strategy to political vision always requires adaptation and a detailed understanding of particular contexts for its effectiveness.”)

⁴³⁹ *See* Gordon, *supra* note 8, at 446.

⁴⁴⁰ KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 12-13 (Nahum Isaac Stone trans., Int’l Lib. Pub. Co. 1904) (1859), *available at* <http://marxists.org/archive/marx/works/1859/critique-pol-economy/preface-abs.htm>.

⁴⁴¹ As Hal Draper has put it:

To engage in class struggle it is not necessary to ‘believe in’ the class struggle any more than it is necessary to believe in Newton in order to fall from an airplane The working class moves toward class struggle insofar as capitalism fails to satisfy its economic and social needs and aspirations, not insofar as it is told about struggle by Marxists. There is no evidence that workers like to struggle any more than anyone

is two-fold: how prevailing and ever-changing social conditions—“the complex web of social, political, and cultural norms” of which Buchanan speaks—affect individual and collective political consciousness, and how and when such consciousness is likely to translate into action and, in turn, change those conditions.

As with articulating alternative normative visions, here, too, our approaches have been under-theorized. Like Buchanan, many scholars enjoin lawyers to be cognizant of the dynamic social context in which they work.⁴⁴² López, for example, acknowledges the need to pay “attention not only to international, national, and regional matters but also to their interplay with seemingly more mundane local affairs.”⁴⁴³ Framing progressive lawyering within these multiple, inter-related, dynamic contexts is, of course, essential. But what *are* our analyses of the governing historical, social, economic and political context? And how might they inform potential action?

With notable exceptions,⁴⁴⁴ progressive lawyering theorists have tended to answer these questions tangentially, recently within the context of community-based campaigns. At times, the answers come in the form of transhistorical rules to which a lawyer ought to conform.⁴⁴⁵ At other times, they are delimited within and detail the lawyer’s tasks in local advocacy efforts.⁴⁴⁶ In those instances, one might say that larger political analyses are implicit. Rarely do such analyses directly address the overarching political context.

Yet it is only through a grasp of such macro circumstances that we prioritize and calibrate activist strategy and tactics. Our clients are steeped in communities of victimization and resistance. As Ashar points out in his critique of the prototypical law clinic that represents only individual clients, “[i]ndividual clients are part of formal and informal movements of resistance.”⁴⁴⁷ Such “client-centered” lawyering approaches

[a]ssume that clients reach the lawyers in a state of defeat, devoid of resistance and easily subject to manipulation. *As clinicians are beginning to discover, the starting analysis may be defective.* The assumption of defeat is an analysis made without looking at the real

else; the evidence is that capitalism compels and accustoms them to do so.

HAL DRAPER, 2 KARL MARX’S THEORY OF REVOLUTION: THE POLITICS OF SOCIAL CLASSES 42 (1978).

⁴⁴² See *supra* note 437.

⁴⁴³ LÓPEZ, *supra* note 8, at 38.

⁴⁴⁴ See, e.g., Gordon, *supra* note 8 (contextualizing Workplace Project’s work in 1980s-90s historical period); Kinoy, *supra* note 187, at 276-99 (analyzing political period of late 1960s and early ‘70s); White, *To Learn and Teach*, *supra* note 39 (analyzing apartheid);

⁴⁴⁵ See, e.g., Fox, *supra* note 15; Lai et al., *supra* note 117; Quigley, *supra* note 46.

⁴⁴⁶ See, e.g., Gordon, *supra* note 32; Hing, *supra* note 117.

⁴⁴⁷ See Ashar, *supra* note 1, at 379; see also LÓPEZ, *supra* note 8.

client in her full context—culturally, politically and economically. It is an assumption made . . . without considering the counterbalancing force which allows the client to survive under incredibly oppressive conditions. It may simply be that lawyers . . . , even well-intentioned ones, do not have the tools by which to recognize and measure the skills and the power of resistance.⁴⁴⁸

Motivating client activism under dynamic social conditions requires the development and constant assessment and reassessment of a political perspective that *measures* that resistance and its possibilities. That task in turn requires the development of specific activist goals within the context of such analyses, and perhaps broader, national and international strategy—what some call the political “next step.” This is particularly true today, when the economic crisis plaguing capitalism, the “war on terror” and climate change undeniably have world-wide dimensions. Instances of failure, too, need to be part of that analysis, because they teach us much about why otherwise promising activist efforts do not become sustained mass movements of the sort to which we all aspire.

Thus, the theoretical need is two-fold: to construct a broader organizing perspective from a political standpoint, and to consider activism *writ large*. Without reading the pulse of prevailing social conditions, it is easy to miscalculate what that next step ought to be. We will not build a mass movement though sheer perseverance—a linear, idealist conception of change at odds with dynamic social conditions. By the same token, we may underestimate the potential of such mass activism if we focus simply on the local dimensions of our work.

The dialectic between a dynamic social context and political consciousness and action requires a constant organizational and political calibration and modulation often missing from theoretical scholarship. Without such a working perspective, we are apt to be either ultra-left or overly conservative. As Jim Pope put it recently in the context of new forms of labor organizing: “If we limit our vision of the future to include only approaches that work within the prevailing legal regime and balance of forces, then we are likely to be irrelevant when and if the opportunity for a paradigm shift arises.”⁴⁴⁹ The cyclical nature of labor organizing, he argues, mirrors politics generally:

American political life as a whole has likewise alternated between periods characterized by public action, idealism, and reform on the

⁴⁴⁸ Ashar, *supra* note 1, at 378, quoting Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345, 352-53 (1997) (emphasis added).

⁴⁴⁹ James Gray Pope, *Next-Wave Organizing and the Transition to a New Paradigm of Labor Law*, 50 N.Y. LAW SCH. L.R. 515, 521(2006).

one hand, and periods of private interest, materialism, and retrenchment on the other. A prolonged private period spawns orgies of corruption and extremes of wealth and poverty that, sooner or later, ignite passionate movements for reform.⁴⁵⁰

C. 'Activism': Towards a Broader, Deeper, Systematic Framework

In progressive lawyering theory, grassroots activism is frequently equated with "community organizing" and "movement" or "mobilization" politics.⁴⁵¹ Indeed, these methods have come to predominate activist lawyering in much the same way as "public interest law" has come for many to encompass all forms of progressive practice. "Activism" is, of course, broader still. Even on its own terms, the history of community organizing and social movements in the United States includes two vitally important traditions frequently given short shrift in this realm: industrial union organizing and alternative political party-building.⁴⁵² In this section, my aim is not to catalogue the myriad ways in which lawyers and clients can and do become active (methodically or institutionally)—which, given human creativity and progress, in any event may be impossible to do—but rather to problematize three assumptions: first, the tendency to define grassroots activity narrowly; second, the notion that certain groups—for example "the poor" or the "subordinated"—are the definitive agents of social change; and finally, the conviction that mass mobilization or movement-building, by itself, is key to social transformation.

1. Grassroots Activism

There are countless ways in which people become socially or politically active. Yet even the more expansive and sophisticated considerations of activism in progressive lawyering theory tend to unnecessarily circumscribe activism. For example, Cummings and Eagly argue that we need to "unpack" the term "organizing."⁴⁵³ Contrasting two strategies of the welfare rights movement in the 1960s, these authors distinguish between "mobilization as short-term community action and organizing as an effort to build long-term institutional power."⁴⁵⁴ In the same breath, however, they define organizing "as shorthand for a range of *community-based* practices,"⁴⁵⁵ even though at least some activism, for example union organizing or, say,

⁴⁵⁰ *Id.* at 533.

⁴⁵¹ *See, e.g.*, Ashar, *supra* note 1; Cummings & Eagly, *supra* note 4; Ginger, *supra* note 2.

⁴⁵² *See, e.g.*, Price & Davis, *supra* note 4.

⁴⁵³ *See* Cummings & Eagly, *supra* note 4, at 480.

⁴⁵⁴ *Id.* at 481.

⁴⁵⁵ *Id.* (emphasis added).

fasting, might not be best characterized as “community-based.”

What is required is a larger framework that takes into account the sum total of activist initiatives. Lucie White argues that we need to “map out the internal microdynamics of progressive grassroots initiatives . . . observe the multiple impacts of different kinds of initiatives on wide spheres of social and political life . . . and devise typologies, or models, or theories that map out a range of opportunities for collaboration.”⁴⁵⁶ This map would be inadequate—and therefore inaccurate—if we include certain activist initiatives and not others. But that is precisely what the progressive lawyering literature has done by failing to regularly consider, for example, union organizing or alternative political party-building.

2. *Agents of Social Change: Identity, Class and Political Ideology*

As with our definition of activism, here, too, the problem is a lack of clarity, breadth or scope, which leads to misorientation. Have we defined, with theoretical precision, the social-change agents to whom we are orienting—e.g., the “people,” the “poor,” the “subordinated,” “low-income communities” or “communities of color?” And if so, are these groupings, so defined, the primary agents of social change?

By attempting to harmonize three interrelated (yet divergent) approaches to client activism—organizing on the bases of geography and identity, class and the workplace, and political ideology—modern community organizing simultaneously blurs and balkanizes the social-change agents to whom we need to orient. What, after all, is “community?” In geographic terms, local efforts alone cannot address social problems with global dimensions.⁴⁵⁷ As Pope observed of workers’ centers: “the tension between the local and particularistic focus of community unionism and the global scope of trendsetting corporations like Wal-Mart makes it highly unlikely that community unionism will displace industrial unionism as ‘the’ next paradigm of worker organization.”⁴⁵⁸

On the other hand, members of cross-class, identity-based “communities” may not necessarily share the same interests. In the “Asian American community,” Ancheta explains:

[u]sing the word “community” in its singular form is often a misnomer, because Asian Pacific Americans comprise many communities, each with its own history, culture and language: Filipino, Chinese, Japanese, Korean, Vietnamese, Thai, Cambodian, Lao, Lao-Mien,

⁴⁵⁶ White, *Collaborative Lawyering*, *supra* note 39, at 160-61.

⁴⁵⁷ See, e.g., Cummings & Eagly, *supra* note 4, at 484-488. This is poignantly illustrated today with the collapse of the international financial markets.

⁴⁵⁸ Pope, *supra* note 449, at 528.

Hmong, Indian, Indonesian, Malaysian, Samoan, Tongan, Guamanian, Native Hawaiian, and more. The legal problems facing individuals from different communities defy simple categorization. The problems of a fourth-generation Japanese American victim of job discrimination, a monolingual refugee from Laos seeking shelter from domestic violence, an elderly immigrant from the Philippines trying to keep a job, and a newcomer from Western Samoa trying to reunite with relatives living abroad all present unique challenges. Add in factors such as gender, sexual orientation, age, and disability, and the problems become even more complex.⁴⁵⁹

Angela Harris echoes this observation by pointing out how some feminist legal theory assumes “a unitary, ‘essential’ women’s experience [that] can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”⁴⁶⁰ The same might be said of the “people,” which, like the “working class,” may be too broad. Other categorizations—such as “low-income workers,” “immigrants”, and the “poor”, for example—may be too narrow to have the social weight to fundamentally transform society.

In practice, progressive lawyers orient to the *politically advanced* among these various “communities.” In so doing, then, we need to acknowledge that we are organizing on the basis of political ideology, and not simply geography, identity or class. Building the strongest possible mass movement, therefore, requires an orientation not only towards certain “subordinated” communities, but to the politically advanced generally. Otherwise, we may be undermining activism *writ large*.

This is not to denigrate autonomous community efforts. As I have mentioned, subordinated communities of course have the *right* to self-determination, *i.e.* to organize separately. But the point is not simply to organize groups of people who experience a particular oppression, but rather to identify those who have the social power to transform society. Arguing that these agents are the collective, multi-racial working class, Smith explains:

The Marxist definition of the working class has little in common with those of sociologists. Neither income level nor self-definition are [sic] what determine social class. Although income levels obviously bear some relationship to class, some workers earn the same or higher salaries than some people who fall into the category of middle class. And many people who consider themselves “middle

⁴⁵⁹ Ancheta, *supra* note 41 at 1379.

⁴⁶⁰ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990); *see also* Simon, *supra* note 385, at 1104 (“When lawyers are portrayed as having responsibilities to collectivities or ‘communities,’ the communities are described as if they were fully constituted with homogeneous interests.”)

class" are in fact workers. Nor is class defined by categories such as white and blue collar. For Marx the working class is defined by its relationship to the means of production. Broadly speaking, those who do not control the means of production and are forced to sell their labor power to capitalists are workers.⁴⁶¹

The practical consequence of this very well may be that we redefine who we represent as clients and consider activism or potential activism outside subordinated communities, for example union activity and alternative political-party building, as part of our work.

3. *From Movementism to Political Organization*

Dogged as our work is in the activist realm, any effort at fundamental social transformation is doomed without effective political leadership. Such leadership, in turn, requires work not often associated with "activism," such as, for example, theoretical study.⁴⁶² "Movementism,"⁴⁶³ by which I mean the conviction that building a mass movement is *the* answer to oppression and exploitation, has its limitations. Even though activism itself is perhaps the best school for political education, we have an enormous amount to learn from our predecessors. In the final analysis, fundamental social transformation will only come about if there are *political organizations* clear enough, motivated enough, experienced enough, large enough, embedded enough and agile enough to respond to the twists and turns endemic in any struggle for power. "The problem," as Bellow astutely observed, "is not our analytic weaknesses, but the opportunistic, strategic, and political character of our subject."⁴⁶⁴ Such opportunities typically occur when there is a confluence of three factors: a social crisis; a socio-economic elite that finds itself divided over how to overcome it; and a powerful mass movement from below. As I understand the nature of social change, *successful* social transformations occur when there is a fourth element: political organization.

CONCLUSION

Client activism is not a monolithic, mechanical object. Most of the time, it is neither the gathering mass movement many of us wish for, nor the inert, atomized few in need of external, professional motivation. Rather, activism is a phenomenon in constant ebb and flow, a

⁴⁶¹ Smith, *supra* note 201, at 37-38.

⁴⁶² *But see, e.g.*, Gordon, *supra* note 8 (discussing use of workers' course in workers center activism).

⁴⁶³ For an explanation of "movementism" as a political phenomenon, see Chris Harman, *Women's Liberation & Revolutionary Socialism*, in 23 INT'L SOCIALISM 3 (1984); see also Smith, *supra* note 201, at 6-9.

⁴⁶⁴ Bellow, *supra* note 8, at 297.

mercurial, fluid complex shaped by an unremitting diversity of factors. The key through the maze of lawyering advice and precaution is therefore to take a hard, sober look at the overarching state of activism. Are our clients in fact active or are they not? How many are and who are they? What is the nature of this period? Economically? Politically? Culturally? What are the defining issues? What political and organizing trends can be discerned? With which organizations are our clients active, if any? What demands are they articulating, and how are they articulating them?

This is a complex evaluation, one requiring the formulation, development and constant assessment and reassessment of an overarching political perspective. My aim in this Article is to begin to theorize the various approaches to this evaluation. In essence, I am arguing for the elaboration of a systematic macropolitical analysis in progressive lawyering theory. Here, my purpose is not to present a comprehensive set of political considerations, but rather to develop a framework for, and to investigate the limitations of, present considerations in three areas: strategic aims; prevailing social conditions; and methods of activism. Consciously or not, admittedly or not, informed and systematic or not, progressive lawyers undertake their work with certain assumptions, perspectives and biases. Progressive lawyering theory would be a much more effective and concrete guide to action—to defining the lawyer's role in fostering activism—if it would elaborate on these considerations and transform implicit and perhaps delimited assumptions and approaches into explicit and hopefully broader choices.

Over the past four decades, there has been remarkable continuity and consistency in progressive lawyers' use of litigation, legislation, direct services, education and organizing to stimulate and support client activism. The theoretical "breaks" to which Buchanan has referred⁴⁶⁵ have not been so much about the practice of lawyering itself, but rather about unarticulated shifts in ultimate goals, societal analyses, and activist priorities, each necessitated by changes in the social, economic, and political context. That simply is another way of stating the obvious: that progressive lawyers change their practices to adapt to changing circumstances. The recurrent problem in progressive lawyering theory is that many commentators have tended to *generalize* these practice changes to apply across social circumstances. In so doing, they displace and often replace more fundamental differences over strategic goals, interpretation of social contexts, and organizing priorities with debates over the mechanics of lawyering practice.

The argument is turned on its head: we often assume or tend to

⁴⁶⁵ See Buchanan, *supra* note 6.

assume agreement over the meanings and underlying conceptual frameworks relating to “fundamental social change,” current political analysis, and “community organizing,” and debate lawyering strategy and tactics; but instead we should be elaborating and clarifying these threshold political considerations as a prerequisite to using what we ultimately agree to be a broad and flexible set of lawyering tools. In effect, the various approaches to lawyering have become the currency by which scholars have debated politics and activism. The irony is that our disagreements are less about lawyering approaches per se, I believe, than they are about our ultimate political objectives, our analyses of contemporary opportunities, and our views of the optimal paths from the latter to the former. The myriad lawyering descriptions and prescriptions progressive lawyering theory offers are of limited use unless they are anchored in these primary considerations. How do we decide if we should subscribe to “rebellious” and not traditional “public interest” lawyering, for example, or “collaborative” over “critical” lawyering, if we do not interrogate these questions and instead rush too quickly into practical questions? The differences among these approaches matter precisely because they have different political goals, are based on different political analyses, and employ different political activist strategies.

Activist lawyers already engage in these analyses—necessarily so. To foster client activism, they must read prevailing social conditions and strategize with their clients about the political next step, often with an eye toward a long-term goal. But I don’t think we necessarily engage in these analyses as consciously, or with as full a picture of the history and dynamics involved or options available, as we could. Often this is because there simply isn’t time to engage these questions. Or perhaps not wanting to dominate our clients, we squelch our own political analysis and agenda to allow for organic, indigenous leadership from below. But if we are truly collaborative—and when we feel strongly enough about certain political issues—we engage on issues and argue them out. In either event, we undertake an unsystematic engagement of these fundamental issues at our peril.

If we adhere to the belief that only organized, politicized masses of people can alter or replace exploitative and oppressive institutions and bring about lasting fundamental social change, then, as progressive lawyers, we need to be clear about which legal tactics can bring about such a sustained effort in each historical moment. Without concrete and comprehensive diagnoses of ultimate political goals, social and economic contexts, and organizing priorities, progressive legal practice will fail to live up to its potential.